Public Prosecutor v Mohd Bandar Shah bin Nordin & Anor

HIGH COURT (IPOH) — CRIMINAL TRIAL NO 45–36 OF 2002
VT SINGHAM J
24 AUGUST 2004

Criminal Law — Dangerous Drugs Act (Malaysia) — s 39B(1)(a) — Trafficking — Dangerous drugs found in black bag — Whether both or any oen of accused had control and custody over dangerous drugs found — Whether mere knowledge sufficient — Link between accused and drugs — Presumption — s 37(d) — Whether possible to invoke

Evidence — Documentary evidence — Admissibility — First information report — Police report — Whether police report first information report

Evidence — Witness — Credibility of witness — Inconsistency in testimony between police report lodged and oral evidence given in court — Whether inconsistencies affect credibility

The accuseds were charged with an offence under s 39B(1)(a) Dangerous Drugs Act 1952 read together with s 34 of Penal Code. According to the prosecution, both accuseds were behaving in a suspicious manner at the parking bay of the resting area at the Plus Highway Tapah. At the material time, the accuseds were seen meddling with something inside the carrier of the motorcycle No AEF 2360 ('the motorcycle'). The first accused was seated on the motorcycle while the second accused was standing beside the motorcycle. When approached by the policemen, both accuseds attempted to run off. Subsequently, under examination-in-chief, PW3 testified that it was only the first accused who was meddling with something inside the carrier of the motorcycle. Later on under cross-examination, he changed his version again and testified that both the accuseds were meddling with something inside the carrier of the motorcycle. However, PW3 did not mention the black bag and if he had seen it before both the accuseds were chased. After being caught, the accuseds were brought back to the parking area of the motorcycle. PW3 took a black bag which was inside the carrier of the motorcycle and carried out a search. He opened the black bag and found a plastic bag containing substance suspected to be ganja. The accuseds were arrested and PW3 lodged a police report upon arriving at the police station. The defence sought to admit the police report as evidence in court. Despite the prosecution's objection, the court allowed it. There were a number of discrepancies and contradictions between the evidence given orally in court by PW3 and his police report.

Held, acquitting and discharging the accuseds:

(1) As there was no satisfactory explanation from PW3 for the serious and material discrepancies, contradictions or omissions between his

evidence in court and the police report lodged by him and also having considered his evidence at the close of the prosecution's case and tested with the rest of the evidence, the court found that his credit has not been saved and his evidence on the crucial ingredient of the charge, being possession is impeached (see para 7). PW3 was an unreliable witness and his veracity doubtful (see para 14). The prosecution's case was insufficient to meet the requirements of a *prima facie* case and was not safe to call for defence (see para 13).

(2) There was no nexus or link between the black bag and/or the dangerous drugs found inside the black bag and the accuseds so as to connect the accuseds with the crime alleged to have been committed by them apart from the mere flight of both the accuseds which was of no significance when viewed in isolation unless there were other sufficient evidence to implicate the accuseds which was lacking in the instant case (see para 24). Moreover, there was insufficient evidence to show that both the accuseds or either one of them had knowledge or control and custody of the dangerous drug found inside the black bag in order to invoke the presumption under s 37(d) of the Dangerous Drugs Act 1952 (see para 29).

(3) However, even if the accused had knowledge of the black bag, it was still insufficient to link them to the dangerous drugs found in the black bag as 'mere knowledge' was insufficient to prove 'custody or control' unless there is other evidence for the court to draw such inference (see para 35). The fact that the second accused was seen beside the first accused did not make him to have knowledge or control of the dangerous drug as he could be an innocent bystander and the fact that the first accused was seen sitting on or was beside the motorcycle did not necessarily meant that the first accused ought to have knowledge or control of the dangerous drugs (see para 55).

(4) The motorcycle in which the black bag with the dangerous drug were found, could not be held to 'anything whatsoever containing' as stipulated in s 37(d) of the said Act. Therefore, the presumptions contained in s 37(d) and (h) of the said Act did not apply the dangerous drugs were not found concealed in a specially constructed compartment of the said motorcycle (see para 61).

(5) There was insufficient evidence to draw an inference or to trigger the doctrine of common intention against the accuseds as required under the law (see para 66).

(6) There is no universal application that a police report is not admissible because it is not a first information report so long as it is relevant to show consistency or rebut or show inconsistencies with the evidence of a prosecution witness and to expose the infirmity of the prosecution

case during the prosecution case itself and this is a matter for the court to decide on the set of facts in each case (see para 73).

(7) The issue of inadmissibility of the police report on the ground that it is not a first information report under s 107 of the Criminal Procedure Code as contended by the deputy public prosecutor was entirely a separate matter and does not prevent the court from looking at it where it becomes necessary to ascertain the truth in respect of the charge which is framed and where the justice of the case so demands to direct a copy to be furnished to the defence so long as it is a relevant piece of evidence or it may cast a serious reflection on the fairness of the trial (see para 73).

(8) In the instant case, the prosecution cannot plead ignorance of the contents of the police report lodged by PW3 which contains material contradictions and omissions and conflicts with his evidence in court on the crucial issue of possession and at the same time however seek to salvage the credibility of PW3 by attempting to withhold it on the ground that it is not a first information report which no doubt would have resulted in a miscarriage of justice if the police report was not brought to light. It is important to state at this stage that the circumstances as in the instant case triggers s 4 of the Criminal Procedure Code to be of assistance and has to be invoked by the court as the right of an accused to produce material evidence through cross-examination to cast doubt in the prosecution case and during the prosecution case itself is a substantive right and cannot be disregarded as a mere procedural matter (see para 76).

(9) If a police report being a previous statement by a witness may be used to show consistencies with his evidence in court and may afford some ground of believing the witness then there is no reason why a police report of a witness notwithstanding that it may not be a first information report cannot be used to contradict the witness with his evidence in court and if necessary to show that there is some ground for disbelieving him when tested with the rest of the evidence (*PP v Chow Kam Meng* [2001] 7 CLJ 387 followed). The mere fact that the police report is not a first information report does not necessarily render it inadmissible if it is found to be relevant to determine an issue before the court and it may become so relevant if it is indicative of a state of mind, such as control or the power to dispose of (see para 79).

[**Bahasa Malaysia summary**

Tertuduh dituduh dengan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dibaca bersama dengan s 34 Kanun Keseksaan. Mengikut pendakwa, kedua-dua tertuduh berkelakuan mencurigakan di tempat letak kereta di kawasan rehat di Lebuh raya Plus Tapah. Pada masa yang material,

tertuduh-tertuduh dilihat sedang mengusik sesuatu di dalam raga motosikal No AEF 2360 (motosikal tersebut). Tertuduh pertama duduk di atas motosikal tersebut manakala tertuduh kedua berdiri di sebelah motosikal tersebut. Apabila polis menghampiri mereka, kedua-dua tertuduh cuba melarikan diri. Semasa pemeriksaan utama, PW3 mengatakan bahawa hanya tertuduh pertama yang mengusik sesuatu di dalam raga motosikal tersebut. Kemudiannya semasa pemeriksaan balas, beliau menukar pernyataannya dan menyatakan bahawa kedua-dua tertuduh mengusik sesuatu di dalam raga motosikal tersebut. Tetapi, PW3 tidak memberitahu apa-apa mengenai beg warna hitam dan jika beliau telah nampak beg itu terdahulu sebelum mengejar tertuduh. Selepas ditangkap, tertuduh dibawa ke tempat letak motosikal tersebut. PW3 mengambil beg hitam dari dalam raga motosikal dan melakukan satu pemeriksaan. Beliau membuka beg hitam tersebut dan menjumpai bahan yang disyaki sebagai ganja. Kedua-dua tertuduh ditangkap dan PW3 melaporkan satu laporan polis semasa sampai di balai polis. Peguam pembela memohon untuk mengemukakan laporan polis tersebut sebagai keterangan di mahkamah. Walaupun di bantah oleh pendakwa raya, mahkamah membenarkannya. Terdapat beberapa perbezaan dan percanggahan di antara keterangan yang diberi secara lisan di mahkamah oleh PW 3 dan laporan polis tersebut.

Diputuskan, membebaskan dan melepaskan tertuduh-tertuduh:

(1) Oleh kerana tidak terdapat penjelasan yang memuaskan dari PW3 berkenaan dengan perbezaan dan percanggahan yang serius dan material di antara keterangannya di mahkamah dan laporan polis yang difailkan olehnya dan juga setelah menimbang keterangannya pada akhir kes pendakwa raya dan setelah mengujinya dengan keseluruhan keterangan, mahkamah mendapati kebolehpercayaannya dan keterangannya mengenai unsur utama penuduhan, iaitu milikan, tercabar (lihat perenggan 7). PW3 adalah seorang saksi yang tidak boleh diharap dan kebolehpercayaannya di sangsi (lihat perenggan 14). Kes pendakwa raya tidak mencukupi untuk memenuhi keperluan satu kes prima facie dan adalah tidak selamat untuk memanggil pembelaan (lihat perenggan 13).

(2) Tidak terdapat pertalian atau perhubungan di antara beg hitam dan/atau dadah berbahaya yang dijumpai di dalam beg hitam tersebut dan kedua-dua tertuduh untuk mengaitkan yang tertuduh dengan kesalahan yang dikatakan dilakukan oleh yang tertuduh tersebut melainkan mereka cuba melarikan diri yang mana bukanlah penting apabila dilihat secara berasingan melainkan jika terdapat keterangan penting yang lain untuk membabitkan yang tertuduh yang mana tidak ada di dalam kes semasa (lihat perenggan 24). Tambahan lagi, tiada cukup keterangan yang menunjukkan bahawa kedua-dua tertuduh atau salah seorang darinya mempunyai pengetahuan atau kawalan dan milikan dadah berbahaya yang dijumpai di dalam beg hitam tersebut untuk membangkitkan

anggapan di bawah s 37(d) Akta Dadah Berbahaya 1952 (lihat perenggan 29).

(3) Walaupun jika tertuduh mempunyai pengetahuan mengenai beg hitam tersebut, ia masih tidak mencukupi untuk mengaitkan mereka dengan dadah berbahaya yang dijumpai di dalam beg hitam tersebut kerana 'pengetahuan semata' tidak mencukupi untuk membuktikan 'milikan dan kawalan' melainkan jika terdapat keterangan lain untuk mahkamah membuat inferens sedemikian (lihat perenggan 35). Fakta bahawa tertuduh kedua dilihat berada di samping tertuduh pertama tidak membuatkannya mempunyai pengetahuan atau kawalan terhadap dadah berbahaya tersebut kerana beliau mungkin adalah seorang yang tidak bersalah yang berada di tempat kejadian dan fakta yang tertuduh pertama dilihat duduk atau berada di sebelah motosikal tersebut tidak semestinya bererti yang tertuduh pertama patut mempunyai pengetahuan atau kawalan terhadap dadah berbahaya tersebut (lihat perenggan 55).

(4) Motosikal tersebut yang mana beg hitam yang mengandungi dadah berbahaya itu ditemui, tidak boleh diputuskan sebagai 'apa-apa yang mengandungi' sebagaimana yang diperuntukkan di dalam s 37(d) Akta tersebut. Oleh yang demikian, anggapan yang terkandung di dalam s 37(d) dan (h) Akta tersebut tidak dapat diguna pakai, dadah berbahaya tersebut tidak tersembunyi di dalam kompartmen yang dibina khas di motosikal tersebut (lihat perenggan 61).

(5) Tiada keterangan yang cukup untuk dibuat inferens atau untuk membangkitkan niat bersama terhadap tertuduh sebagaimana yang diperlukan oleh undang-undang (lihat perenggan 66).

(6) Tiada penggunaan am yang satu laporan polis tidak boleh diterima kerana ia bukan satu laporan maklumat pertama selama ia relevan untuk menunjukkan kekonsistenan atau menyangkal atau menunjukkan ketidakkonsistenan dengan keterangan saksi pendakwa dan untuk mendedahkan kelemahan kes pendakwa raya dan ianya merupakan satu perkara untuk mahkamah putuskan berdasarkan fakta-fakta setiap kes (lihat perenggan 73).

(7) Isu ketidakbolehterimaan laporan polis atas alasan ianya bukan satu laporan maklumat pertama di bawah s 107 Kanun Prosedur Jenayah seperti yang dihujahkan oleh timbalan pendakwa raya adalah satu perkara yang lain sama sekali dan ia tidak menghalang mahkamah dari menimbangnya apabila ia perlu bagi memastikan kebenaran berhubung dengan caj yang dibuat dan demi keadilan kes ianya perlu bagi mengarahkan satu salinan dikemukakan kepada pihak defendan selama ia merupakan satu keterangan yang relevan atau ia mungkin memberi kesan kepada keadilan sesuatu perbicaraan (lihat perenggan 73).

(8) Dalam kes semasa, pendakwa raya tidak boleh mengatakan yang mereka tidak mempunyai pengetahuan mengenai kandungan laporan polis yang dibuat oleh PW3 yang mengandungi perbezaan yang material dan percanggahan dengan keterangannya di mahkamah mengenai isu penting berkenaan dengan milikan dan pada masa yang sama ingin menyelamatkan kebolehpercayaan PW3 dengan mencuba untuk menghalangnya atas alasan ianya bukan laporan maklumat pertama yang tidak sangsi lagi akan menjejaskan keadilan jika laporan polis tersebut tidak diketengahkan. Ianya penting untuk dinyatakan pada tahap ini bahawa keadaan-keadaan di dalam kes semasa membangkitkan s 4 Kanun Prosedur Jenayah dan perlu digunakan oleh mahkamah kerana hak tertuduh untuk mengemukakan keterangan material melalui pemeriksaan balas untuk meletakkan kesangsian pada kes pendakwa raya adalah satu hak yang substantif dan tidak boleh dianggap sebagai satu perkara prosedur semata (lihat perenggan 76).

(9) Jika laporan polis tersebut yang merupakan pernyataan terdahulu yang dibuat oleh seorang saksi boleh digunakan untuk menunjukkan kekonsistenan dengan keterangannya di mahkamah dan mungkin boleh memberi alasan untuk mempercayai saksi maka tiada sebab kenapa satu laporan polis seorang saksi tidak kira ianya mungkin bukan satu laporan maklumat pertama tidak dapat digunakan untuk menyangkal saksi berkenaan keterangannya di mahkamah dan jika perlu untuk menunjukkan yang terdapatnya alasan untuk tidak mempercayainya apabila diuji dengan keterangan yang lainnya (*PP v Chow Kam Meng* [2001] 7 CLJ 387 diikuti). Fakta semata yang laporan polis bukanlah satu laporan maklumat pertama tidak semestinya membuatnya tidak boleh diterima jika didapati relevan bagi memutuskan sesuatu isu di mahkamah dan ia mungkin menjadi relevan jika ia menunjukkan keadaan minda, seperti kawalan dan kuasa (lihat perenggan 79).]

Notes

For cases on admissability of documentary evidence, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1048–1056.

For cases on s 39B Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 135–454.

For cases on the credibility of witnesses, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2531–2556.

Cases referred to

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Adel Muhammed el Dabbah v AG for Palestine (1944) AC 156 (refd)
Ah Mee v Public Prosecutor [1967] 1 MLJ 220 (folld)

Alcontara a/l Ambross Anthony v Public Prosecutor [1996] 1 MLJ 209 (refd)
Aziz Bin Muhamad Din v Public Prosecutor [1996] 5 MLJ 473 (folld)
BA Rao & Ors v Sapuran Kaur & Anor [1978] 2 MLJ 146 (refd)
Balasingham v Public Prosecutor [1959] MLJ 193 (folld)
Balfour v Public Prosecutor (1949) Supp MLJ 8 (refd)
Bashir v State AIR 1953 ALL 668 (refd)
Berry v British Transport Commission [1961] 3 All ER 65 (refd)
Chan Kwok Keung & Anor v The Queen [1990] 1 CLJ 411 (refd)
Chan Pean Leon v Public Prosecutor [1956] MLJ 237 (folld)
Chandrasekaran & Ors v Public Prosecutor [1971] 1 MLJ 153 (folld)
Chew Cheng Lye v Reg [1956] MLJ 240 (refd)
Choo Chang Teik & Anor v Public Prosecutor [1991] 3 MLJ 423 (folld)
Choo Yoke Choy v Public Prosecutor [1992] 2 MLJ 632 (folld)
Dato' Mokhtar Bin Hashim & Anor v Public Prosecutor [1983] 2 MLJ 232 (folld)
De Silva v Public Prosecutor [1964] MLJ 81 (refd)
Dharmendrasinh v State of Gujerat 2002 SCC (Cri) 859 (refd)
Dudley v Holland [1963] 3 All ER 732 (refd)
Gooi Loo Seng v Public Prosecutor [1993] 2 MLJ 137 (folld)
Gray 12 Cr App Report 244 (folld)
Hari Ram Seghal v Public Prosecutor [1981] MLJ 165 (refd)
Husdi v Public Prosecutor [1980] MLJ 80 (folld)
Isa Bin Che Noh & Ors v Public Prosecutor [1956] MLJ 93 (refd)
Jaafar Bin Deris v Public Prosecutor [1956] MLJ 183 (refd)
Jayaraman & Ors v Public Prosecutor [1982] 2 MLJ 273 (folld)
Jones v Great Western Railway Company 144 LT 194 (refd)
Jusoh Bin Awang v Public Prosecutor [1950] MLJ 69 (folld)
Karpal Singh v Public Prosecutor [1991] 2 MLJ 544 (refd)
Khoon Chye Hin v Public Prosecutor [1961] MLJ 105 (refd)
Kiew Foo Mui & Ors v Public Prosecutor [1995] 3 MLJ 505 (refd)
Koay Chooi v Regina [1955] MLJ 209 (folld)
Krishnan & Anor v Public Prosecutor [1981] 2 MLJ 121 (refd)
Krishnan v Public Prosecutor [1987] 1 MLJ 292 (refd)
Lee Lee Chong v Pendakwa Raya [1999] 1 AMR 925; [1998] 4 MLJ 697 (folld)
Lee Yoon Choy & 2 Ors v Public Prosecutor (1949) 15 MLJ 66 (refd)
Leow Nghee Lim v Reg [1956] MLJ 28 (refd)
Mahbubb Shah (1945) 27 LR 941 (refd)
Mahinder Singh v Public Prosecutor [1967] 1 MLJ 126 (refd)
Matru @ Girish Chandra v The State Of UP AIR 1971 SC 1051 (refd)
Matthew Lim v Game Warden, Pahang [1960] MLJ 89 (refd)
McArdle v Egan & Ors (1934) 150 LT 412 (refd)
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Muniandy & Ors v Public Prosecutor [1966] 1 MLJ 257 (refd)
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Neo Koon Cheo v Reg [1959] MLJ 47 (refd)

Ng Ah Kiat v Public Prosecutor [1987] 2 MLJ 336 (refd)
Ong Ah Chuan v Public Prosecutor, Koh Chai Cheng v Public Prosecutor [1981] 1 MLJ 64 (refd)
Ong Chong Hin v Reg [1959] MLJ 96 (refd)
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Pang Chee Meng v Public Prosecutor [1992] 1 MLJ 137 (folld)
Pavone v Public Prosecutor (No 2) [1986] 1 MLJ 423 (refd)
Phoon Liat Sum v Public Prosecutor [1950] MLJ 205 (refd)
Pie Bin Chin v Public Prosecutor [1985] 1 MLJ 234 (refd)
PP v Chow Kam Meng [2001] 7 CLJ 387; [2001] MLJU 386 (folld)
PP v Lin Lian Chen [1992] 2 MLJ 561(folld)
PP v Mohamad Musa Amarullah [2002] 1 MLJ 561 (refd)
Public Prosecutor v Ahmad Bin Puteh & 2 Ors [1987] 1 CLJ 488 (refd)
Public Prosecutor v Aris Bin Yunus [1989] 1 CLJ 239 (folld)
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Public Prosecutor v Chan Ah Kow & Anor [1998] 3 MLJ 337 (refd)
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Public Prosecutor v Foong Chee Cheong [1970] 1 MLJ 97 (folld)
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Public Prosecutor v Hairul Din Bin Zainal Abidin [2001] 6 MLJ 146 (refd)
Public Prosecutor v Ibrahim Bin Arifin [1993] MLJU 246 (refd)
Public Prosecutor v Kau Joo Huat [1988] 2 MLJ 91 (refd)
Public Prosecutor v Lai Ah Bee [1974] 2 MLJ 74 (refd)
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Public Prosecutor v Mohamed Ali [1962] MLJ 257 (refd)
Public Prosecutor v Mohd Ali Bin Abang & Ors [1994] 2 MLJ 12 (folld)
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Public Prosecutor v Muhamad Nasir Bin Shaharuddin & Anor [1994] 2 MLJ 576 (refd)
Public Prosecutor v Ong Cheng Heong [1998] 6 MLJ 678 (refd)
Public Prosecutor v Ooi Chun Seng [1991] 1 CLJ 609 (refd)
Public Prosecutor v Ramasamy (1939) MLJ Rep 129 (refd)
Public Prosecutor v Saat Hassan & Ors [1988] 2 CLJ (Rep) 290 (folld)
Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16 (folld)
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Public Prosecutor v Teh Eng Wah [1999] MLJU 120 (folld)
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R v Golder, R v Jones, R v Porritt [1960] 3 All ER 457 (folld)

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Seneviratne v R (1936) 3 All ER 36 (refd)
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Sia Soon Suan v Public Prosecutor [1966] 1 MLJ 116 (refd)
State Of Kerala v MM Mathew & Anor AIR 1978 SC 1571 (refd)
State Of Punjab And Gurmej Singh v Jit Singh & Others AIR 1994 SC 549 (refd)
Syed Ali Bin Syed Abdul Hamid & Anor v Public Prosecutor [1982] 1 MLJ 132 (folld)
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Teh Geok Hock v Public Prosecutor [1989] 3 MLJ 162 (refd)
Teo Peen Soon & Ors v Reg [1956] MLJ 241 (refd)
The King v Dora Harris (1927) 2 KB 587 (refd)
Ti Chuee Hiang v Public Prosecutor [1995] 2 MLJ 433 (refd)
Toh Ah Loh And Mak Thim v Rex [1949] MLJ 54 (refd)
Tua Kin Ling v Public Prosecutor [1970] 2 MLJ 61 (refd)
Wong Chooi v Public Prosecutor [1967] 2 MLJ 180 (folld)
Wong Nyet Wah v Public Prosecutor [1962] MLJ 312 (folld)
Yap Sing Hock & Anor v Public Prosecutor [1992] 2 CLJ 719 (refd)
Yee Ya Mang v Public Prosecutor [1972] 1 MLJ 120 (refd)
Yusoff Bin Sidin v Public Prosecutor [1971] 1 MLJ 203 (folld)

Legislation referred to

Criminal Procedure Code ss 4, 17, 107, 425
Dangerous Drugs Act 1952 ss 37(d), (g), (h), 37(da), 39B(1)(a), (2)
Evidence Act 1950 ss 145, 155, 165
Penal Code s 34

Sakthivel Nagalingam (Sakthi & Co) for the first accused.
Mahinderjit Singh (Charan Singh with him) (Mahinderjit & Charan) for the second accused.
Raja Rozela bte Raja Toran DPP (State Legal Adviser's Chambers) for the prosecution

VT Singham J:

[1] In this case, the charge (as per encl 6) against both the accuseds is as follows:

> Bahawa kamu pada 24 Januari 2002 lebih kurang jam 10mlm, di kawasan rehat Tapah, Lebuh raya Utara Selatan di dalam Daerah Batang Padang di dalam Negeri

Perak Darul Ridzuan, dengan niat bersama, telah mengedar dadah berbahaya iaitu Cannabis seberat 976 gram dan oleh itu kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) dan dibaca bersama s 34 Kanun Keseksaan dan boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] The prosecution introduced evidence through eight witnesses, the main witness being the complainant, Cpl Shaffiai Bin Abdullah (PW3), the arresting officer.

[3] This court finds that the prosecution has failed to establish a *prima facie* case against both the accuseds. Accordingly, both the accuseds were acquitted and discharged without calling for their defence.

[4] The evidence of the main witness, the complainant Cpl Shaffiai Bin Abdullah (PW3), the arresting officer is most unreliable, unsatisfactory, inconsistent and contains material contradictions on the crucial ingredient of the offence, being possession, either in law or in fact. He was not even able to give any satisfactory explanation to the material contradictions between his evidence in court and his version in the police report. *In his evidence in court about one year and nine months later on 14 October 2003 during examination-in-chief*, he had testified that both the accuseds who were at the scene of the crime at the parking bay of the resting area at the Plus Highway Tapah on 24 January 2002 at/about 10pm were behaving in a suspicious manner. At the time *he saw both the accuseds meddling with something inside the carrier of the motorcycle No AEF 2360 (exh P6)*. The first accused was seated on the motorcycle No AEF 2360 and the second accused was standing beside the motorcycle. At the time, he and his team of policemen proceeded near to both the accuseds. On reaching near them, he identified himself as a policeman, both the accuseds attempted to run before he could do anything. He chased the first accused together with L/Cpl Ismail and L/Cpl Salleh whereas L/Cpl Shukri, L/Cpl Nazri and L/Cpl Nasaruddin chased the second accused. *He arrested the first accused* and carried out a search on him and found that he was Mohd Bandar Shah bin Nordin. Subsequently, still under examination-in-chief, PW3 testified that *it was only the first accused who was meddling with something inside the carrier of the motorcycle*. Later on *under cross-examination, he changed his version again and testified that both the accuseds were meddling with something inside the carrier of the motorcycle*. It is important to note at this stage that PW3 did not mention the black bag (exh P12) and if he had seen it before both the accuseds were chased. PW3 continued with his testimony that *after he arrested the first accused*, he brought him back to the parking area of the motorcycle and *the second accused who was also arrested* was also brought back to the parking area of the motorcycle. He then took a black bag (exh P12) which was inside the carrier of the motorcycle and carried out a search. He opened the black bag and found a plastic bag and he opened the plastic bag and he found 'ketulan mampat' which he suspected to be ganja. The 'ketulan mampat' which was inside the plastic bag was wrapped with a piece of newspaper (exh P15). *He arrested both the accuseds* and informed them of the offence committed.

[5] PW3 continued to testify that at the time when both the accuseds were being chased, D/Cpl Norzee Bin Abd Rahman (PW5) was guarding the motorcycle. It is important to note at this stage that PW3 did not say of anything about the black bag or that PW5 was guarding the black bag or the motorcycle with the black bag but was only guarding the motorcycle. He then contacted *the investigating officer C/Insp Zuraidi B Zakaria (PW8) who instructed him to wait at the scene of the crime*. C/Insp Zuraidi and police photographer S Ulaganathan (PW2) came to the scene of the crime. After photographs of the scene were taken, C/Insp Zuraidi (PW8) instructed him and the other policemen to take the accuseds, the motorcycle and the items recovered and he returned to Balai Polis Tapah. He lodged a police report at the Balai Polis Tapah and then handed both the accuseds and the items recovered to C/Insp Zuraidi B Zakaria (PW8). He then prepared a search list (exh P11) and handed it to the accuseds.

POLICE REPORT (EXH D20)

[6] As for the police report lodged by PW3 immediately after the arrest against both the accuseds, learned defence counsel for the second accused applied to the court to direct the witness to produce the police report which the witness had admitted he had lodged immediately after the arrest of both the accuseds on 25 January 2002 at 1.20am The learned deputy public prosecutor objected to the production of the police report (exh D20) on the ground that it was not a first information report. However, this court ordered it to be produced to the court and after reading it, *found material contradictions and omissions* and then directed a copy of the same to be supplied to the defence counsel for the purpose of cross-examining the witness (PW3) on his police report and his evidence in court (see s 145 to be read with s 155 of the Evidence Act 1950) (see s 165 of the Evidence Act 1950) (see *Matthew Lim v Game Warden, Pahang* [1960] MLJ 89, *Yusoff Bin Sidin v Public Prosecutor* [1971] 1 MLJ 203, *Husdi v Public Prosecutor* [1980] MLJ 80, *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 273 at p 277 and *Public Prosecutor v Lee Ah Ha* [1989] 1 MLJ 120 at p 121). PW3 having admitted his police report, defence counsel successfully applied to have it admitted and marked as defence exhibit (exh D20) (see *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322, *Public Prosecutor v Ibrahim Bin Arifin* [1993] 2 CLJ 529, *PP v Mohamad Musa Amarullah* [2002] 1 CLJ 366).

[7] On the material omissions and contradictions between PW3's evidence in court and his police report (exh D20), there was an application by the learned defence counsel for the second accused to impeach PW3. In granting the application to conduct the impeachment proceedings and after having been satisfied that the contradictions and omissions were material this court read out and explained the relevant passages in his police report (exh D20) and the relevant piece of evidence in court by him to PW3 who was

given a chance to explain the discrepancies and omissions. This court found that he was not able to satisfactorily explain. There was no satisfactory explanation from PW3 for the serious and material discrepancies, contradictions or omissions between his evidence in court and the police report he lodged on 25 January 2002 at 1.20am about three hours after the arrest of both accuseds. Even if PW3 has no motive to falsely implicate both the accuseds, it is still no reason to believe his testimony in court where his evidence as a whole is found to be unreliable and not safe to accept. This court is also mindful that although the prosecution is only obliged at the close of their case to establish *prima facie* case but however this court cannot be seen to be blinket to the glaring and material contradictions, inconsistencies and omissions to the most crucial ingredient, being possession. However, this court reserved its ruling on the impeachment proceedings until the close of the prosecution case (see *Dato' Mokhtar Bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232). Having considered the evidence of PW3 at the close of the prosecution's case and tested with the rest of the evidence, this court found that his credit has not been saved and his evidence on the crucial ingredient of the charge, being possession is impeached (see *Muthusamy v Public Prosecutor* (1948) MLJ 57, *Jusoh Bin Awang v Public Prosecutor* [1950] MLJ 69, *Matthew Lim v Game Warden, Pahang* [1960] MLJ 89, *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121 at pp 122–124, *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 273 at p 277, *Dato' Mokhtar Bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, *Public Prosecutor v Tan Seow Chuan* [1985] 1 MLJ 318 at pp 323–324, *Public Prosecutor v Basri Omar* [2002] 7 CLJ 564 at p 571). On the other hand, if this court had erred in law and on the facts to have impeached PW3, this court found that the evidence of PW3 when tested with the rest of the evidence was still insufficient and not safe to find against the accuseds and it has left this court with grave doubt as to whether the accuseds had custody and control of the dangerous drugs found in the black bag or the black bag itself (exh P12) (see *Koay Chooi v Regina* [1955] MLJ 209 at p 210 and *Public Prosecutor v Mohd Ali Bin Abang & Ors* [1994] 2 MLJ 12 at p 20). In the instant case, this court found that there were insufficient facts or basis for the court to draw an inference against the accuseds that both the accuseds or either the first accused or the second accused had custody and control of the dangerous drugs found in the black bag (exh P12) or even the black bag itself.

[8] This court found that in PW3's police report (exh D20) which was lodged about three hours after the arrest of both the accuseds on 25 January 2002 at 1.20am, PW3 has stated *that he saw the first accused just seated on the motorcycle and the second accused standing beside the motorcycle and talking to each other in a suspicious manner*. He identified himself as police and both the accuseds attempted to run away. He and his policemen chased the accuseds and after some struggle managed to detain them. He and his men searched the accuseds and did not find anything incriminating against the law on them. He and his men brought back both the accuseds to the place where the

motorcycle (exh P6) was parked. *He searched the carrier of the motorcycle* and found a black bag (exh P12). *He searched inside the black bag* (exh P12) and found a plastic packet (exh P13) *and inside the plastic packet* (exh P13), he found another plastic packet (exh P14) and *inside the second plastic packet* (exh P14), he found a 'ketul bahan kering' which he found to be ganja. He took possession of the ganja and returned to the police station with both the accuseds. PW3 did not state in his police report (exh D20) that neither the first accused or both the accuseds were meddling with something inside the carrier of the motorcycle. *In his police report* (exh D20) *he did not mention that there was a black bag in the carrier of the motorcycle or whether he saw it before both accuseds were detained after the chase*. In his police report (exh D20) he said that it was only after he brought both the accuseds back to the place where the motorcycle was parked, he carried out a search inside the carrier of the motorcycle and found the black bag (exh P12) which in the court's view would appear that the black bag was never inside the carrier of the motorcycle when PW3 first saw the first accused seated on the motorcycle and the second accused standing beside the motorcycle and talking to each other.

[9] On the other hand, *in his evidence in court* on 14 October 2003 in his examination-in-chief, D/Cpl Shaffiai Bin Abdullah (PW3) testified that when he opened the black bag (exh P12), he found one plastic bag and inside the second bag, he found a plastic bag wrapped with newspaper (exh P15) and he found two pairs of shirts (exhs P16A and P16B) inside the basket carrier of the motorcycle he found another plastic paper with ganja whereas in his police report (exh D20) he has stated that inside the black bag (exh P12), he saw a plastic packet (exh P13) and inside the plastic packet, he saw another plastic packet (exh P14) and the second plastic packet was covered with dried leaves suspected to be ganja. In his examination-in-chief, he testified that D/Cpl Norzee (PW5) was guarding the motorcycle when he and the other policemen chased after both the accuseds whereas in his police report (exh D20) he has stated that he discovered the black bag (exh P12) only after he carried out a search inside the carrier of the motorcycle and after both the accuseds were detained. In his police report, he did not mention the existence of the black bag (exh P12) at the time when he went towards them and when they were purported to be meddling with something inside the carrier of the motorcycle or that he saw the black bag (exh P12) there or that D/Cpl Norzee (PW5) was left behind to guard the black bag (exh P12) when PW3 and the other policemen chased towards both the accuseds. In fact, PW3 clearly testified that D/Cpl Norzee was only guarding the motorcycle.

[10] *In his evidence in court on 14 October 2003*, PW3 testified that on informing the investigating officer C/Insp Zuraidi of the arrest of both the accused, *C/Insp Zuraidi (PW8) and the police photographer S Ulaganathan (PW2) came to the scene of the crime at the resting area of the Plus Highway Tapah* and he continued to repeat the same version throughout his examination-in-chief and even during the early

stage of the *cross-examination in the morning on 15 October 2003* where he had denied suggestion from the defence counsel that he had waited at the Plaza Tol Bidor of the Plus Highway where C/Insp Zuraidi had met him there and not at the scene of the alleged incident as testified by him. However, *during cross-examination in the afternoon of 15 October 2003, he gave two different sets of his version*. He testified that he now then *agreed that his motorcar and another motorcar stopped at the Plaza Tol Bidor but it was to pay for the toll charges and he then proceeded straight to the police station*. Later on when pressed further, he *admitted that he waited at the Plaza Tol, Bidor for C/Insp Zuraidi* (PW8) *to arrive and then C/Insp Zuraidi* (PW8) *arrived with the police photographer at the Plaza Tol Bidor* where he met both of them. It is from Plaza Tol Bidor that *C/Insp Zuraidi* (PW8), *the police photographer* (PW2) *and PW3* went to the scene of the crime after having waited at the Plaza Tol Bidor for about one hour. When he was asked to explain the contradictions to his previous evidence in court in his examination-in-chief that he testified that *he waited at the scene of the crime and C/Insp Zuraidi (PW8) arrived at the scene of the crime*, he denied that he had lied in his evidence. He admitted that when he, C/Insp Zuraidi (PW8) and the police photographer (PW2) went to the scene of the crime from Plaza Tol Bidor about an hour later, the motorcycle was not parked on its original position as it was moved and also the position of the black bag (exh P12) inside the carrier of the motorcycle was not on its original position. He admitted that the position of the motorcycle and the black bag inside the carrier of the motorcycle were both not in its original position as shown in the police photographs.

[11] This court found that in his police report (exh D20) which was lodged about three hours after the arrest of both the accuseds on 24 January 2002, PW3 did not state that the *first accused* who was seated on the motorcycle was *meddling with something inside the black bag* which was in the carrier of the motorcycle but he had merely stated that he was seated on the motorcycle and the second accused was standing beside the motorcycle. *In his police report* (exh D20), PW3 did not state that he saw the black bag inside the carrier of the motorcycle when he went nearer to both the accuseds. In fact in his evidence in court, PW3 had testified that the police team and PW3 chased both the accuseds who attempted to run and after a chase managed to detain them. When both the accuseds were brought back to the motorcycle, PW3 *searched the motorcycle and only then* he found a black bag in the carrier. Inside the plastic packet he *found another plastic packet* which was *wrapped with newspaper* and *inside the second plastic packet* he found dangerous drugs which was suspected to be ganja. *Whereas in his evidence* in court, PW3 had testified that he saw the first accused who was seated on the motorcycle *meddling with something* inside a black bag which was inside the carrier of the motorcycle and when PW3 and his team chased both the accuseds who attempted to run away, the motorcycle was guarded by another detective. D/Cpl Norzee Bin Abdul Rahman (PW5) which is a complete and material departure of his version in his police report on a *significant and crucial ingredient of the charge*, being

possession (see *Mahinder Singh v Public Prosecutor* [1967] 1 MLJ 126, FC at pp 127–128).

[12] In the search list (exh P11), PW3 has stated that inside the black plastic bag, there was 'satu ketulan bahan mampat disyaki ganja'. The search list (exh P11) does not contain the two plastic bags (exhs P13 and P14) which was inside the black bag (exh P12) and the newspaper (exh P15) which is again a contradiction of the evidence of PW3 that he saw two plastic packets and the newspaper and the plastic "lutsinar" inside the black bag (exh P12). The very essence of the offence being possession and being a material ingredient of the charge shows conflict of evidence in the prosecution case. In *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 at p 142, His Lordship Edgar Joseph Jr SCJ for the Supreme Court said:

> But, of equal importance, was the point that the trial judge failed to recognize *the significance of the contents of the search list*; in particular, as we have already remarked, that *it told a materially different story to that deposed to by Insp Nordin regarding the circumstances under which the heroin was recovered*, and as a result, he inferred that the appellant had custody and control of the heroin and knew of its nature (Emphasis by this court).
>
> *We need hardly add, that even if the appellant had known of the presence of the heroin in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it* given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there. At the end of the day, this was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well (Emphasis by this court).
>
> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles.

[13] On the other hand, the police photographer L/Cpl S Ulaganathan (PW2) had earlier testified on 13 October 2003 that *he went to the place of crime with C/Insp Zuraidi (PW8) at/about 11pm at the rest area Plus Highway Tapah and took photographs*. He testified that *when he arrived at the scene, both the accuseds were not at the scene of the crime*. He did not take photographs of the suspects at the scene of the crime as he was not instructed by C/Insp Zuraidi (PW8). The police photographer (PW2) did not testify that he arrived with C/Insp Zuraidi (PW8) at the Plaza Tol Bidor where he was supposed to have met PW3 and it was from there that all three of them ie PW2, PW3 and PW8 were supposed to have gone to the scene of the crime. Based on the evidence of PW3 when tested with the rest of the evidence, both oral and documentary, this court finds that the prosecution story contains several pieces of jigsaw evidence which is insufficient to meet the requirements of a *prima facie* case and was not safe to call for defence.

[14] This court has observed closely the witness (PW3) in the witness box while he was giving evidence at the trial. This court found that the answers

given by him during cross-examination were not definite and firm, sometimes he was reluctant or hesitant to answer and remained silent and looked towards the deputy public prosecutor when he was pressed by the defence counsel to explain the discrepancies and contradictions between the version he has stated in his police report (exh D20) and his testimony in court. He was also found to be evasive in his answers, waivering and murmuring to himself and whenever he remained silent, he would continuously look towards the deputy public prosecutor and he has to be reminded by the court to look towards the bench and not the deputy public prosecutor after the questions were put to him. PW3 is found to be an unreliable witness and his veracity doubtful. In *Mohamed Ali v Public Prosecutor* [1962] MLJ 230, His Lordship Ong J (as he then was) observed:

> In my judgment the conviction cannot be sustained. It was quite clear that the complainant had lied. Once his veracity had been shown to be doubtful, the whole of his evidence must be scrutinised with care. It could no longer be accepted at its full face value.

[15] In arriving at the finding that PW3 is an unreliable witness and his veracity is doubtful, this court has considered the following cases wherein:

[16] In *Ah Mee v Public Prosecutor* [1967] 1 MLJ 220 at p 223, His Lordship HT Ong FJ (as he then was) observed:

> then there is no accounting for the serious discrepancies between her evidence and the report she had made to the police. The two stories are clearly irreconcilable

[17] In *State Of Punjab And Gurmej Singh v Jit Singh & Others* AIR 1994 SC 549, the Supreme Court of India in dismissing the appeal said:

> *The High Court noticed that this prevarication shows that he has deliberately improved his version from stage to stage. When interested witnesses are examined it is well settled that the evidence has to be tested in the light of the probabilities and the previous statements and the surrounding circumstances.* We are satisfied that their evidence does not inspire any confidence. *In the FIR* it is stated that PW Nos 2 and 3 went to irrigate the field from that tube well water but *while giving statements at the trial* they deposed that only PW2 was to irrigate the field by working the tube well while PW3 had accompanied him to the tube well to meet the deceased as mentioned above. Their presence thus becomes *doubtful from the fact that they have not come forward with a proper explanation for giving two versions.* In these circumstances we cannot say that the High Court went wrong in ordering acquittal (Emphasis by this court).

[18] In *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105 at p 107, His Lordship Thomson CJ said:

> In our view this is wrong and calculated to mislead a jury. If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness

A has been proved a liar on one or two points then the whole of his evidence 'must in law be rejected' is to go too far and is wrong.

[19] In *De Silva v Public Prosecutor* [1964] MLJ 81 at p 83, His Lordship Gill J (as he then was) said:

B Discrepancies and contradictions there will always be in any case. In considering them what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy. It is true that the learned president has not specifically referred to these discrepancies and contradictions, but it does not follow that he did not consider them, particularly when he has given a fairly full summary of the evidence C of each witness.

[20] In *Pie Bin Chin v Public Prosecutor* [1985] 1 MLJ 234 at p 235, His Lordship Wan Yahya J (as he then was) said:

D I shall be dealing with the first point last. As regards the second ground of appeal, my attention had been drawn to various discrepancies between PW1's evidence itself as well as between him and his wife. This, by itself, according to counsel for the appellant, is good enough reason for the learned president to reject the complainant's story. Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as E well as the defence. The transcripts of most evidence, when thoroughly tooth-combed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness's entire evidence incredible. *It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded* (Emphasis by this court).

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Forgetfulness and failure to recall exactly certain events, which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief. Various persons are endowed with varying powers of cognition, attentiveness and perception so that it is not uncommon for G two witnesses to a common event to describe it in slightly differing versions. Thus the slight dissimilarity between the evidence of the complainant and his wife is explicable. It was further contended that the inconsistencies in the evidence of the complainant itself, should make his story unreliable. It is true that he gave capricious accounts of certain facts but then those matters relate mostly to subsidiary issues. He was understandably vague on details on sequence of events H relating to the payments but of the payments themselves and the amount paid on each occasion the witness's evidence was positive and categorical. I agree with the learned president's findings on this not only because he, having seen and heard the witness is in a better position than I am to evaluate the credibility of the witnesses, but also because I accept that no witness of truth can account for the details of events which had transpired some 17 months previously with precision.

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[21] In *Tua Kin Ling v Public Prosecutor* [1970] 2 MLJ 61 at p 63, His Lordship Syed Othman J (as he then was) said:

the case for the prosecution as it stood in view of the conflicting testimony was no better than that against the acquitted man.

[22] In *Mohamed Alias v Public Prosecutor* [1983] 2 MLJ 172, His Lordship Charles Ho J said:

> The most important witness for the prosecution was undoubtedly PW4. He gave evidence regarding the circumstances which led to the demand for payment of the $60 by appellant and the actual payment of the money to appellant. This witness was cross-examined by counsel for appellant at great length. There were a number of discrepancies in his testimony and because of this the learned trial magistrate regarded him as an unreliable witness. She, however, did not state whether she rejected the whole of the testimony given by this witness. She appeared to have relied on part of the evidence of this witness in her judgment. The fact that there are discrepancies in a witness' testimony does not straight-away make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept parts of the witness' evidence if it considers them to be true. It is important, in my view, for the trial magistrate to state clearly whether the testimony of a certain witness whom he or she considers as unreliable is to be disregarded completely. In considering the discrepancies the court should take into account the educational background and experience of the witness and whether the witness is describing events which have taken place recently or a long time ago and the demeanour.

[23] This court is of the view that the mere act of running and attempting to run itself is insufficient to implicate the accuseds or to find them to be in possession of the drugs found inside the black bag (exh P12) which was found inside the carrier of the motorcycle parked in the parking bay of the Plus Rest Area, Plus Highway, Tapah unless there was nexus between the dangerous drugs seized or the black bag and the accuseds so as to connect the conduct of the flight of both the accuseds. In *Public Prosecutor v Ooi Chun Seng* [1991] 1 CLJ 609 at p 613, His Lordship KC Vohrah J (as he then was) referred to a passage from the judgment of the Indian Supreme Court in *Matru @ Girish Chandra v The State Of UP* AIR 1971 SC 1051 at 1058 which is as follows:

> The appellant's conduct in absconding was also relied upon. Now *mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind*. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime: such is the instinct of self-preservation. *The act of absconding is no doubt a relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction*. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused (Emphasis by this court).

> In my view there is reasonable doubt created on the prosecution's case that various aspects of his conduct indicated that he knew what he was carrying was morphine.

(See also *Public Prosecutor v Tan Tuan Seng* [1993] 2 CLJ 557 and *Abdullah Zawawi Bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1, *Public Prosecutor v Mansur Bin Rashid* [1996] 3 MLJ 360, *Chan Kwok Keung & Anor v The Queen* [1990] 1 CLJ 411 and *Public Prosecutor v Letchumanan* [2000] 4 CLJ 685 at 691).

[24] This court finds that there is no nexus or link between the black bag (exh P12) and/or the dangerous drugs found inside the black bag and the accuseds so as to connect the accuseds with the crime alleged to have been committed by them apart from the mere flight of both the accuseds which is of no significance when viewed in isolation unless there were other sufficient evidence to implicate the accuseds which is lacking in the instant case (see *Rex v Taylor* (1923) 87 Cp 104, *Neo Koon Cheo v Reg* [1959] MLJ 47 (*Public Prosecutor v Teh Eng Wah* [1999] 8 CLJ 451 at p 455, *Public Prosecutor v Letchumanan* [2000] 4 MLJ 449 *Public Prosecutor v Mohd Farid Bin Mohd Sukis & Anor* [2002] 3 MLJ 401, *Abdullah Zawawi Bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1) where the conduct of the accused in attempting to run was found to be of no consequence as there was no nexus between the dangerous drugs seized by the police and the flight of the accused.

[25] Sarkar's Law of Evidence 15th Edition 1999 Vol 1 states:

> 23 *Absconding or flight. See Illustration (i) to the section* — Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. The act is a relevant piece of evidence to be considered along with other evidence but its value would depend upon the circumstances of each case. Normally, evidence for sustaining a conviction can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other hypothesis than that of the guilt of the accused. Though the conduct of accused in absconding immediately after the occurrence is relevant evidence as indicating to some extent his guilty mind, it is not conclusive of that fact because sometimes even innocent persons when suspected may abscond to avoid arrest. The disappearance of the accused after the commission of the alleged crime is a circumstance which in the absence of any plausible explanation, might be taken against them. The absconding by itself is not conclusive of either guilt or guilty conscience. Absconding may lend weight to other evidence establishing the guilt of an accused, but by itself, is hardly any evidence of guilt. Absconding is a weak link in the chain of circumstances and is not conclusive either of the guilt or guilty conscience.
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> Mere abscondence of an accused is a very weak circumstance and cannot form the basis of conviction. Where the accused conceal themselves away from their normal residence, after the occurrence, it certainly indicates the guilty mind of the accused. But absconding is usually but slight evidence of guilt. Mere absconding should not form the basis of a conviction.
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> Where the accused made confession, led the police party to the situs and after the recovery of the dead body tried to run away from the scene, it was held that the conduct of the accused in attempting to run away, if taken in isolation could not be a sufficient pointer of his guilt, yet when read in the context of the whole

circumstances of the case, the conduct was certainly of relevance, though, not incriminating by itself.

Absconsion by itself may not be a damning circumstance against an accused person, but when the body of his wife in his own house with multiple injuries on vital parts such as the neck and the accused is aware of the same, the fleeing away of the accused from the place sufficiently indicates his guilty mind. It is in these circumstances, that the running away of the accused from the scene of offence can be pressed in to serve by the prosecution against him.

Where after the wife and three daughters of the accused had been done to death, the accused took no steps, remained absconding for three days, and did not make himself voluntarily available, and the police could arrest him after great difficulty, it was held the absconding of the accused immediately after the occurrence is a serious circumstance to be taken into consideration against him. The conduct of the accused after murdering his two daughters the incriminating conduct is relevant.

It is no doubt true that per se absconding is not enough to prove the guilt of the person who has absconded. But it comes in as an important piece of corroborative evidence, if there is other evidence to prove the connection of the accused with the crime. In this case the accused ran away to Pakistan after the commission of the murder and came back from there after 40 days. The accused gave no plausible explanation for his absence. The motive on the part of the accused to commit the murder of the deceased was established. The absconding of the accused for such a long period was taken into consideration by the Court and the accused was convicted on charge of murder under Section 302 1 PC.

The fact of absconding is relevant as explaining subsequent conduct. But absence of accused, from his house for a couple of days does not prove that the accused absconded.

[26] In *Lee Lee Chong v Pendakwa Raya* [1999] 1 AMR 925 at 937, His Lordship Gopal Sri Ram JCA said:

Suffice to say that flight, or attempted flight, from the scene of a crime is recognised by high authority as not in itself signifying guilt for, 'an innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way' (see *Abdullah Zawawi Bin Yusoff v Public Prosecutor* [1993] 2 AMR 2121, at p 2130, per Edgar Joseph Jr SCJ).

[27] In *Public Prosecutor v Ha Jong Ru* [1980] 2 MLJ 256, His Lordship Tan Chiaw Thong J said:

In the instant case the circumstances were that PW1 had been lying in wait then running out of his ambush position and trying to stop the respondent. She did not stop, so he gave chase after her. When he finally stopped her, he identified himself as a police officer. She tried to escape. He gave chase and finally caught up with her. At that time, she was shivering and looked pale. Is this conduct by itself sufficient to prove legal possession of the incriminating documents against the respondent? Is it the only and irresistible inference that the conduct of the

respondent showed that she was in possession of the incriminating documents bearing in mind the fact that possession in the sense as had been indicated earlier must be proved by the prosecution beyond any reasonable doubt against the respondent? To my mind, *although the conduct of the respondent in this case may be said to be highly suspicious, I do not consider however that, without more, it is sufficient to go beyond the tine of strong suspicion and cause it to be at the stage where it can be said that the prosecution, merely by the conduct of the respondent, has proved possession in law against her.* In this case, had the prosecution gone further and proved that the respondent had sole custody and control of the bicycle, then this, coupled with the fact of the conduct of the respondent, may probably raise an irresistible inference against her that she had possession of the incriminating documents. But what evidence is there regarding the relationship between the respondent and the bicycle? There is none beyond the evidence that she was, at the material time, riding on it. In any event, there is no evidence to indicate that the respondent had the sole custody and control of the bicycle including the bicycle bag. In the circumstances and bearing in mind the strict proof of possession required of the prosecution. I do not consider that the lower court had erred in holding that the prosecution had not succeeded in proving possession against the respondent and in the circumstances the appeal against the order of acquittal of the respondent is dismissed (Emphasis by this court).

[28] In *Public Prosecutor v Tan Tuan Seng* [1993] 2 CLJ 557 at p 566 His Lordship Dr Visu Sinnadurai J said:

> Though, generally the fact of the accused running away from the police will be taken into consideration in determining the guilt of the accused, *it must be stressed that no strong inference can be placed on the mere fact that an accused attempted to run away when confronted by a group of police personnel.* In this regard, the caution stated by the Supreme Court in *Choo Chang Teck v PP* [1992] 1 SCR 475 should be borne in mind. The Supreme Court said at p 481: (Emphasis by this court)
>
> > We feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference alone was not sufficient to base a conviction of the appellant

[29] Viewed with the other evidence of the case, this court is unable to find for the prosecution even if the conduct of both the accuseds in attempting to run may be highly suspicious. There is insufficient evidence or evidence is lacking to show at least that both the accuseds or either one of them had knowledge or control and custody of the dangerous drug found inside the black bag in order to invoke the presumption under s 37(d) of the Dangerous Drugs Act 1952. In *A Jayaram And Another v State Of Andhra Pradesh* AIR 1995 SC 2128 at p 2139, GN Ray J for the Supreme Court said:

> The court has to be watchful and avoid the danger of allowing suspicion to take the place of legal proof. Conviction cannot be based on circumstances indicating that the prosecution case is quite likely to be true.

[30] In *State Of Kerala v MM Mathew & Anor* AIR 1978 SC 1571, Jaswant Singh J for the Supreme Court said:

It is now well settled that strong suspicion, strange coincidences and grave doubts cannot take place of legal proof.

[31] This court also finds the phrase (dalam keadaan mencurigakan) where PW3 saw both the accuseds acting in circumstances which raises suspicion is a common phrase used by most policemen in a criminal trial to justify arrest whenever there is no prior information of the alleged crime has been received by the police. In this connection it is important to observe that in order to justify the arrest the suspicion upon which a police officer acts where he ought to act in the course of his duty must be a reasonable suspicion and that there must be circumstances which lead to such reasonable suspicion although there is no necessity for the police officer to satisfy himself that the person he is about to arrest is guilty. In *McArdle v Egan & Ors* (1934) 150 LT 412, Lord Wright at p 412 said:

It has to be remembered that police officers, in determining whether or not to arrest, are not finally to decide the guilt or innocence of the man. Their functions are not judicial, but ministerial…

[32] In the instant case, this court also found that there was no evidence that it was either the first accused or the second accused who rode the motorcycle, or had parked/kept the motorcycle at the parking bay prior to the presence of PW3 at the scene and the word 'keep' should be construed in its natural and judiciously accepted definition even if the motorcycle belonged to the first accused as the word 'keeping' does not apply automatically to the mere presence of the owner of the motor vehicle at/near the motor vehicle (see *Dudley v Holland* [1963] 3 All ER 732).

[33] In *Toh Ah Loh And Mak Thim v Rex* (1949) MLJ 54, His Lordship Gordon–Smith Ag CJ said:

Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of *mens rea*, without which (except by statute) possession cannot be criminal.

[34] In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 at p 239, His Lordship Thomson J (as he then was) said:

Possession itself as regards criminal law is described as follows in Stephen's Digest (9th Edition, p 304):

A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so

A situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding B circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am, but which is also C frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or have done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found, show such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up D with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the Court that the person who is physically in a position to deal with the thing as his own had the intention of doing so…

E MERE KNOWLEDGE IS NOT SUFFICIENT

[35] This court is of the view that even if the accused had knowledge of the black bag, it is still not sufficient to link them to the dangerous drugs found in the black bag as mere knowledge of the black bag in the basket carrier of F the motorcycle itself is insufficient to show that both the accuseds or one of them had custody or control of the black bag or even the dangerous drug in the black bag unless there is other evidence for the court to draw such inference which is lacking in the instant case (see *Jones v Great Western Railway Company* 144 LT 194 at p 202 — dissenting judgment of Lord MacMillan). In G *Phoon Liat Sum v Public Prosecutor* [1950] MLJ 205, His Lordship HM J said:

> Where an accused is found in control but not in actual physical possession of opium, as the evidence disclosed in this case, it is essential that inferences drawn from the evidence as establishing knowledge in the accused must be correctly construed and the conclusions inferred must be capable of only one construction, H the guilty knowledge of the accused.
>
> After very careful consideration of the inferences drawn by the learned president, I have come to the conclusion that some, if not all, of them do not stand up to this test. Some of the evidence on which they were based was capable of a construction equally in favour of the accused.
>
> I
>
> I feel, therefore, though I confess with some hesitation, that there was a doubt in this case, the benefit of which it would have been safer to give to the appellant.

[36] In *Berry v British Transport Commission* [1961] 3 All ER 65 at p 75 Devlin LJ said:

> … presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable… because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because, if they are allowed to multiply to excess, the law will become divorce from reality and will live among fantasies of its own.

[37] In *Ong Ah Chuan v Public Prosecutor, Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 at p 71, Lord Diplock said:

> *One of the fundamental rules of natural justice in the field of criminal law is that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it. This involves the tribunal's being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind as well where that is relevant, were present on the part of the accused.* To describe this fundamental rule as the 'presumption of innocence' may, however, be misleading to those familiar only with English criminal procedure. Observance of the rule does not call for the perpetuation in Singapore of technical rules of evidence and permitted modes of proof of facts precisely as they stood at the date of the commencement of the Constitution. These are largely a legacy of the role played by juries in the administration of criminal justice in England as it developed over the centuries. Some of them may be inappropriate to the conduct of criminal trials in Singapore. What fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged (Emphasis by this court).

[38] In *Leow Nghee Lim v Reg* [1956] MLJ 28 at p 29, His Lordship Taylor J said:

> *An accused is entitled to the benefit of anything which can be elicited from the prosecution evidence; the onus is on the prosecution to adduce convincing evidence of the facts necessary to raise a presumption before the onus on any issue is shifted* (Emphasis by this court).

> There is no presumption of custody. The presumption is from custody. Unless custody was established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.

[39] In *Public Prosecutor v Lai Ah Bee* [1974] 2 MLJ 74 at p 75, His Lordship Chong Min Tat J said:

> *But it is clear that knowledge by itself is not sufficient to fasten possession on the accused. It is only one of the ingredients of possession.* Taylor J in *Leow Nghee Lim*'s case, supra, questioned the correctness of the proposition that if the opium was concealed in

A the drawer with the knowledge of the accused, it followed that he had custody of it (Emphasis by this court).

it may be the deliberate intention of the legislature in its wisdom to require proof of custody or control before the presumption of possession is raised.

B **[40]** In *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120, His Lordship Sharma J said:

The word 'possession' implies a physical capacity *to deal with the thing as one likes to the exclusion of everyone and a determination to exercise that physical power on one's own behalf.* It implies dominion and consciousness in the mind of the person having
C 'possession' that he not only has such dominion but also that he can exercise it. In the present case if, for example, the accused had gone alone to the spot in question and took out the loaded pistol from the place of concealment, the loaded pistol could be said to be in the possession of the accused as it lends support to the conclusion that it was within his exclusive knowledge as to where this pistol was kept concealed in the rubber estate. There may, however, be cases where a
D court is not justified in presuming possession of the person who had mere knowledge of the articles concealed (Emphasis by this court).

but the mere production of such articles by itself would not necessarily prove his possession. It would at the most show that he had knowledge where the articles
E were kept or concealed.

[41] In *Public Prosecutor v Tan Seow Chuan* [1985] 1 MLJ 318 at p 325, His Lordship Peh Swee Chin J said:

For possession to be criminal or to sustain a conviction, *the prosecution must prove also*
F *that the accused had the power of disposal over the thing possessed*, ie the said opium. This is the ratio of the case of Toh Ah Loh (supra). Taylor J in *Leow Nghee Lim* (supra) at p 31, said, to quote: The main distinction between custody and possession is that a custodian has not the power of disposal... . Thomson J (as he then was), also said in *Chan Pean Leon v Public Prosecutor* '... there can be no possession without some power of disposal ...'. Gunn Chit Tuan J in *Public Prosecutor v Ang Soon Foo* quoted
G with approval, the above passages and applied them (Emphasis by this court).

[42] In *Public Prosecutor v Ahmad Bin Puteh & 2 Ors* [1987] 1 CLJ 488 at p 492, His Lordship Lim Beng Choon J said:

the most *that could be said is that the first respondent had knowledge of the concealment. But*
H *knowledge of concealment per se on the facts of this case is not sufficient to require the accused to answer to a charge of trafficking unless the prosecution had adduced sufficient evidence to show that the first respondent had also in his custody and control the amount of the dangerous drug in question which was in excess of the amount stipulated in s 37(da).* The case of *PP v Lai Ah Bee* [1974] 2 MLJ 74 at 75 lends support to this proposition (Emphasis by this court).

I **[43]** In *Public Prosecutor v Kau Joo Huat* [1988] 2 MLJ 91 at p 93, His Lordship Lee Hun Hoe CJ said:

It is a matter of grave doubt whether on the totality of the evidence the prosecution has established that the accused had custody and control of the drug found in the bag. The benefit of the doubt should have been decided in favour of the accused… (Emphasis by this court).

[44] In *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162 at p 163, His Lordship Hashim Yeop A Sani CJ said:

The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug.

[45] In *Public Prosecutor v Muhamad Nasir Bin Shaharuddin & Anor* [1994] 2 MLJ 576 at p 592, His Lordship Visu Sinnadurai J said:

Possession is not defined in the DDA. However, it is now firmly established that to constitute possession, it is necessary to establish that: (a) the person had knowledge of the drugs; and (b) that the person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s 37 of the DDA.

Two points must, however, be stressed at this stage: (i) that knowledge is only one of the ingredients of the offence of possession. *Mere knowledge by itself does not amount to possession. Therefore, even if the prosecution succeeds in establishing knowledge, it must also go a step further and establish control or custody of the drugs by the first accused…* (Emphasis by this court).

Therefore, it is imperative for the prosecution to establish custody and control of the drugs by the first accused for two purposes: (i) if knowledge of the drugs is established by either direct evidence or by the application of the presumption under s 37(g), the prosecution to establish possession, must also establish custody or control of the drugs by the first accused; and (ii) to rely on the presumption under s 37(d), custody and control must first be established.

It is one of the most basic rules of justice that, however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death. But ...his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough (Emphasis by this court).

[46] In *Public Prosecutor v Hairul Din Bin Zainal Abidin* [2001] 6 MLJ 146 at p 156, the case *R v Kelly* [1992] 92 DLR (4th) 643 (SCC) was referred wherein McLachlin J at p 667 said:

It is a fundamental proposition of the criminal law that the law be certain and definitive. This is essential, given the fact that what is at stake is the potential deprivation of a person of his or her liberty and his or her subjection to the

sanction and opprobrium of criminal conviction. This principle has been enshrined in the common law for centuries, encapsulated in the *maxim nullum crimen sine lege, nullapoena sine lege* — there must be no crime or punishment except in accordance with law which is fixed and certain.

This rule is particularly significant in a penal provision that attracts the death penalty as in this case. Thus, in order for any other act to come within the definition in s 2 of the Act it must be limited to the context of the scope of the acts enumerated in the definition section, that is to say, it must relate to an overt act which goes beyond passive possession.

[47] In *Public Prosecutor v Lin Lian Chen* [1992] 1 AMR 253, Edgar Joseph Jr SCJ (speaking for the Supreme Court) said at p 259 of the judgment:

It is trite law that where the prosecution is relying on circumstantial evidence the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient (per Pike CJ in *Chang Kim Siong v PP*).

[48] In another passage of the judgment, His Lordship Edgar Joseph Jr SCJ at p 567 said:

mere knowledge of the presence of the seven newspaper packages or the cigarette packet in the Honda without more would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction (Emphasis by this court).

[49] In *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632 at p 639, His Lordship Anuar J for the Supreme Court said:

It is trite law that mere knowledge is not sufficient to constitute possession: see *PP v Lai Ah Bee*, followed by Edgar Joseph Jr J in *PP v Khoo Boo Hock & Anor* at p 975. It is merely one of the ingredients of possession. Without the evidence of custody or control, the presumption of possession under s 37(d) of the Act cannot arise (Emphasis by this court).

[50] In *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158 at p 159, His Lordship Yong J said:

In my opinion mere posession is one thing and posession with *metis rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

[51] In *Tansley v Painter* [1969] Crim LR 139, the Court of Appeal in setting aside the conviction against the first accused through Lord Parker CJ, Ashworth and Willis JJ said:

> The question was not whether D1 knew what was going on *but whether he was a party to a joint venture. Mere knowledge of what D2 was doing was not sufficient*. There was no evidence entitling the justices to convict (Emphasis by this court).

[52] In *R v Searle And Others* [1971] Crim LR 592 the appellant and another were convicted of possession of various kinds of dangerous drugs. The dangerous drugs were found in a vehicle which the accuseds were using for a touring holiday. The prosecution was unable to prove possession of any particular drug to any particular accused. The prosecution submitted that all the accuseds were in joint possession of all the various kinds of dangerous drugs. The accuseds did not give evidence. All the accuseds were found guilty and convicted. On appeal, the Court of Appeal through Lord Widgery CJ, Roskill and Caulfield JJ (as he then was) allowed the appeal against conviction and said:

> the effect of those parts of the summing-up was to equate knowledge with possession. However, *mere knowledge of the presence of a forbidden article in the hands of a confederate was not enough: joint possession had to be established.* The sort of direction which ought to have been given was to ask the jury to consider whether the drugs formed a common pool from which all had the right to draw at will, and *whether there was a joint enterprise to consume drugs together because then the possession of drugs by one of them in pursuance of that common intention might well be possession on the part of all of them*: Thompson (1869) 21 LT 397. The summing-up was inadequate and possibly misleading (Emphasis by this court).

[53] In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 at p 239, His Lordship Thomson J (as he then was) said:

> 'Possession' itself as regards criminal law is described as follows in Stephen's Digest (9th Edition, p 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[54] In *Public Prosecutor v Hairul Din Bin Zainal Abidin* [2001] 6 MLJ 146 at p 155, His Lordship Augustine Paul J said:

In order to prove the offence against the accused the prosecution must establish that the conduct of the accused falls within one of the acts as defined in s 2 of the Act most of which, as I said earlier, involve the constituent element of possession. The offence may be proved by direct evidence or with the aid of presumptions. Where the possession if passive in the sense that it does not involve any of the acts specified in the definition of 'trafficking' in s 2 of the Act so as to amount to 'trafficking' as defined the prosecution may rely on the presumption contained in s 37(da) of the Act to elevate such possession to 'trafficking' subject to proof of the requirement of the weight of the drugs concerned as specified therein. It must be remembered that it is not permissible to pile the presumption of trafficking under s 37(da) of the Act upon the presumption of possession under s 37(d) of the Act (see *Muhammad bin Hassan v PP* [1998] 2 MLJ 273).

MERE PRESENCE

[55] This court is of the view that the fact that the second accused was seen beside the first accused on the facts in the instant case does not make him to have knowledge or control of the dangerous drug as he could be an innocent bystander. On the other hand, the fact that the first accused was seen seated on or was beside the motorcycle does not necessarily mean that the first accused ought to have knowledge or control of the dangerous drugs.

[56] In *Quek Bee Yam v Public Prosecutor* [1952] MLJ 187, His Lordship Storr J said:

> The mere fact that he was a passenger in a car in which opium was very cleverly concealed in containers screwed to the floor boards underneath his feet cannot in my mind raise more than a mere suspicion of knowledge on his part.

[57] In *Ong Chong Hin v Reg* [1959] MLJ 96, Rose CJ said:

> … the mere fact of the appellant's proximity to these articles, in somebody else's hut does not constitute sufficient evidence of possession to justify a conviction.

[58] In *Wong Nyet Wah v Public Prosecutor* [1962] MLJ 312, His Lordship Ong J (as he then was) said:

> The mere fact of presence could be equally consistent with innocence as with guilt.

[59] *Wong Nyet Wah v Public Prosecutor* followed the case of *Gray* 12 Cr App Report 244 wherein Lord Reading CJ said:

> Equally it must be borne in mind that the mere fact of standing by when the act is committed is not sufficient. A man, to become amenable to the law, must take such a part in the commission of the crime as must be the result of a concerted design to commit the offence (see *Wong Nyet Wah v Public Prosecutor* [1962] MLJ 312 and *Public Prosecutor v Choo Yee Keang* [1991] 3 CLJ 2909)

[60] It is well settled that strong suspicion, strange coincidences and grave doubts cannot take place of legal proof (see *Dato' Mokhtar Bin Hashim & Anor*

v Public Prosecutor [1983] 2 MLJ 232 at p 269, *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678 at p 704, *R v Wallace* 23 Cri App R 32 at p 35). In *State Of Kerala v MM Mathew & Anor* AIR 1978 SC 1571, Jaswant Singh J for the Supreme Court said:

> The courts of law have to judge the evidence before them by applying the well recognised test of basic human probabilities. The evidence of the investigating officers cannot be branded as highly interested on ground that they want that the accuseds are convicted. Such a presumption runs counter to the well recognised principle that *prima facie* public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case (see *Balasingham v Public Prosecutor* [1959] MLJ 193 and *Public Prosecutor v Foong Chee Cheong* [1970] 1 MLJ 97 at p 98).

POSSESSION OF MOTORCYCLE

[61] As for the motorcycle (exh P6) in which the black bag with the dangerous drug were found, this court is of the view that the motorcycle cannot be held to '*anything whatsoever containing*' as stipulated in s 37(d) of the said Act. Therefore, the presumption contained in s 37(d) of the said Act does not apply as the motorcycle in which the dangerous drugs were found is not *anything whatsoever* and the presumption contained in s 37(h) also does not apply as the dangerous drugs were not found concealed in a specially constructed compartment of the said motorcycle (see *Public Prosecutor v Letchumanan* [2000] 4 CLJ 685 at p 690).

[62] In *Syed Ali Bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132 at p 133, His Lordship Salleh Abas HP (as he then was) said:

> There are three presumptions which could possibly be invoked. These are presumptions in paragraphs (d), (g) and (h). The presumption under paragraph (d) says:
>
> > Any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.
>
> *In our view this presumption has no application in the present appeal because the car in which the opium was found cannot be held to be 'anything whatsoever' within the meaning of paragraph (d).* This expression 'anything whatsoever' may appear to have a wide import, but its scope and extent is limited by the word 'containing' which qualifies it. *A car cannot be said to contain drugs nor could it be said to be a container of drugs although opium was found in it. To hold that the car contains drugs would be, in our view, to twist and overstretch the language beyond its common usage.* Thomson J, as he then was, in *Tong Peng Hong v Public Prosecutor* made a thorough analysis of the scope and application of the presumption under paragraph (d). It is sufficient for us here to refer to that part of the judgment where he said: 'Both by derivation and by ordinary usage the word

'containing' implies some measure of holding or restriction or, if we may add, some measure of confinement. That being the case the presumption under paragraph (d) is irrelevant (Emphasis by this court).

The next presumption is one under paragraph (h) of s 37 which says:

> if any dangerous drug is found concealed in any compartment, specially constructed for the purpose, on any vehicle, it shall until the contrary is proved, be deemed to have been so concealed with the knowledge of the owner of the vehicle and of the person in charge of the vehicle for the time being.

The prosecution conceded before us that the presumption under this paragraph has no application to the present appeal because the opium was not found in a specially constructed compartment though it was found hidden or concealed behind the back rest of the rear seat of the car and although the Customs Officers testified that the opium could not be discovered by a rough search of the car nor could it be seen through the boot of the car. As they all testified that there was no specially constructed compartment in the car, coupled with the concession by the prosecution, we agree that there is no point of proceeding any further on this presumption (Emphasis by this court).

[63] In *PP v Lin Lian Chen* [1992] 4 CLJ 2086 at p 2091, His Lordship Edgar Joseph Jr SCJ said:

> In the first place, we *would respectfully agree with the proposition of law* enunciated by Thomson J (as he then was) in *Tong Peng Hong v PP* [1955] 21 MLJ 232, *that a vehicle in which a drug is carried does not ipso facto fall within the words 'anything whatsoever containing' any dangerous drug and therefore in such a case, the presumption contained in s 37(d) does not arise* (Emphasis by this court).
>
> Secondly, *in the present case, the drug was not found concealed in a specially constructed compartment of the Honda, so that it could, in no way, be deemed to have been so concealed with the knowledge of the owner of the Honda or the person in charge of it at the material time, that is to say, the respondent, by reason of the presumption contained in s 37(h)* (Emphasis by this court).
>
> In this context, *mere knowledge of the presence of the seven newspaper packages or the cigarette packet in the Honda without more would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction.* But the position here was that there was not even proof of such knowledge much less proof of knowledge of the presence of the offending exhibits in the seven newspaper packages or the cigarette packet. For example, there was nothing to indicate for how long in all the respondent had been in charge of the Honda and such evidence as had been adduced indicated that he was seen only briefly at the wheel. *No evidence was adduced as to whether the seven packages or the cigarette box had been dusted for fingerprints or as to whether the respondent's hands or fingernail clippings were examined for traces of heroin nor was there anything even suspicious about the behaviour of the respondent before or at the time of his arrest; for example, he made no difficulties when arrested* (Emphasis by this court).
>
> We consider that it would not be an unfair summary of the case for the prosecution against the respondent, on the question whether it was proved that he was in custody or control of the seven packages or the cigarette packet, containing the offending exhibits, if we said that the evidence against him in relation thereto

was, essentially, of juxta position. *It goes without saying that such evidence, which amounts to nothing more than grave suspicion, is totally inadequate for purposes of inferring, control or even custody of the containers concerned, sufficient to attract the presumption under s 37(d). Accordingly, on this ground alone, the learned judge was perfectly entitled to rule, at the close of the case for the prosecution, that the respondent had no case to answer and to acquit and discharge him* (Emphasis by this court).

[64] In *PP v Chow Kam Meng* [2001] 7 CLJ 387 at p 396, His Lordship Abdul Wahab Patail J said:

It has been held that a car is not within the meaning of 'anything whatsoever containing ...' (see *Syed Ali Bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132 FC). Thus *the fact that the accused was the driver of the car in which the three bags containing the drugs were found on the back seat cannot lead to the application of s 37(d) to the drugs in the bags in the car since a car is not an '… anything whatsoever containing …'*. The issue then is whether the accused had custody or control of the bags containing the dangerous drug simply because he was the driver of the car. It was argued for the prosecution that the driver of the car has custody or control because he had the power to refuse to take or carry the passenger if the passenger was carrying drugs. The point however has been made succinctly in *Leow Nghee Lim v R* [1956] MLJ 28, that there is no presumption of custody, and the presumption of possession arises from custody. If Woon Kee Seng brought the bags into the car, as the prosecution argument supposes, and even if it assumed for the sake of argument that the accused knew the nature of the drugs, it would be wrong to infer that the accused had custody of the drugs simply by allowing Woon Kee Seng to bring it with him into the car, while the latter remains in the car and has not left the drugs with the accused (Emphasis by this court).

The conclusion as who has custody or control of the drugs found in the car driven by the accused and in which another is a passenger, without any further evidence, must remain the same as in *PP v Mohamad Fairus Omar* cited above.

In all the circumstances, the failure to adduce evidence to eliminate the possibility that Woon Kee Seng was in possession, or had custody or control, is a fatal flaw in the prosecution case.

[65] In *Public Prosecutor v Tan Tuan Seng* [1993] 2 CLJ 557 at p 560, His Lordship Dato' Dr Visu Sinnadurai J said:

The relevant question in the present case, therefore, is whether the drugs found in the car (albeit found in the bag) can be said to have been found in 'anything' which the accused had custody and control of. In other words, can it be said that since the drugs were found in the car, the car falls within the word 'anything' in s 37(d).

There is now clear authority to establish the principle of law that s 37(d) does not apply merely because the drugs are found in a car, or for that matter in any vehicle. Thomson J in *Tong Peng Hong v PP* [1955] MLJ 232 held that in cases where drugs are found in a vehicle, the statutory presumption contained in s 37(d) could not arise as the vehicle in which the drugs were found did not fall within the words 'anything whatsoever' containing any dangerous drugs.

Similarly, in the case of *Syed Ali v PP* [1982] 1 MLJ 132, the Federal Court expressly held that the presumption under s 37(d) did not apply where opium was found in the car because 'the car … cannot be held to be anything whatsoever within the meaning of paragraph (d)'. Salleh Abas FCJ said:

> This expression 'anything whatsoever' may appear to have a wide import, but its scope and extent is limited by the word 'containing' which qualifies it. A car cannot be said to contain drugs nor could it be said to be a container of drugs although opium was found in it. To hold that the car contains drugs would be, in our view, to twist and overstretch the language beyond its common usage.

Therefore, quite clearly it cannot be said that by the mere fact that the accused had custody or control of the car, he is deemed to be in possession of the drugs found in it.

The question now to consider is whether it can be said that a bag found in a vehicle in which the accused was in, is necessarily, in the custody and/or control of the accused. In determining this issue, a distinction has to be drawn between the situation where the accused person is said to have control and custody of the bag, as opposed to a situation where he merely has control or custody of a vehicle where the drugs were found.

What then is the position an accused who is charged for possession when a bag containing drugs is found in a car in which the accused was? Is the position such that following *Tong Peng Hong* and *Syed Ali*, the prosecution would not be able to invoke the presumption under s 37(d) against the accused.

As this issue has not been expressly dealt with by the Courts in earlier cases, and as there appears to be some confusion in this area of the law, I have taken the opportunity to review, not only the above cases but also others where an accused had been charged for trafficking in drugs for being in possession of drugs found in a car or in any other vehicle. In most of these cases, the drugs, though found in a vehicle were also found in a bag or in some other form of a container, eg a sack or a packet.

The starting point for the analysis of these cases is *Tong Peng Hong*. In this case, drugs were found in a small leather bag locked in a box in a lorry. The owner of the lorry who was in the lorry with the driver and attendant was charged, together with the driver and the attendant, for possession of the drugs. The driver and the attendant were acquitted but the lower Court found the owner of the lorry guilty and convicted him. The prosecution in its case against the owner relied on s 37(d) of the Dangerous Drugs Ordinance, which is in *pari materia* to s 37(d) of the Dangerous Drugs Act.

The President was of the view that s 37(d) was applicable as he took the view that the lorry fell within the words 'anything whatsoever' in s 37(d). On appeal, Thomson J considered in detail the scope of s 37(d), with particular emphasis on the point whether the President was correct in holding that the lorry fell within the word 'anything' in s 37(d). It should, perhaps be pointed out that the observations of Thomson J are limited to a situation where the *owner* of a vehicle is being charged for possession of drugs found in his vehicle.

Thomson J in this case in holding that the President was wrong in taking the view that the lorry was 'anything' within s 37(d) drew a distinction between control of the lorry and control of the bag. In pointing out that the lorry was not the container containing the drugs, he said:

> the thing which contained the opium was not the lorry but the *handbag*.

Thomson J therefore, was of the clear view that a owner of a vehicle does not necessarily have custody of a bag containing drugs found in a vehicle, even if he is in the said vehicle.

The subsequent cases in purporting to rely on Thomson J's view are less clear in drawing this distinction between custody of the vehicle and custody of the bag containing the drugs.

In *PP v Salleh Saad* [1983] 2 MLJ 164, where drugs were found in two sacks in a car (the keys to which were with the accused) parked outside the accused's house, Syed Agil Barakbah J held, following *Tong Peng*'s case that the presumption was not applicable. His Lordship merely said:

> the motorcar in question is not a container that contained the morphine but the sacks which were used to keep the blocks together are the containers. The presumption, therefore, does not apply.

As to whether the accused had custody of the sacks, this, was not considered by His Lordship. Similarly, the Federal Court in *Syed Ali v PP* [1982] 1 MLJ 132 held that where ten packets of opium were found in the back seat of a car, the presumption was not applicable as the car was not 'anything whatsoever'. Again whether the accused had custody of the packets was not considered by the Court.

These two cases, therefore, only establish the principle that if the prosecution is relying on s 37(d), it merely cannot rely on the fact that the drugs were found in a vehicle over which the accused had custody or control. Quite clearly, s 37(d) would not be applicable.

However, following Thomson J's observations in *Tong Peng Hong*, it would appear that if the prosecution wishes to rely on the presumption, the prosecution has first to prove control or custody by the accused not of the vehicle but of the container found in a vehicle containing drugs. The fact that the accused had control and custody of the car may, in certain situations assist the prosecution in proving control and custody of the container, but mere control and custody of the vehicle by itself is insufficient.

I have also considered some of the other cases where a vehicle was involved. In *PP v Arjan Singh* [1989] 1 CLJ 462, a passenger was found in a taxi with a bag containing drugs. *The passenger was acquitted as there was no proof that he knew what was in the bag which he said he was holding for a friend. The presumption under s 37(d) was not relied upon by the prosecution in this case* (Emphasis by this court).

In *PP v Lin Lian Chen* [1991] 1 MLJ 316 HC; [1993] 1 SCR 159 SC, the accused was arrested whilst driving a car in which was found a bag containing drugs by the

police. Before the Supreme Court it was argued by the prosecution that as the accused was the sole occupant of the car at the time, and even though the car did not belong to him; he was in custody or had under his control the drugs recovered from the car. It would appear that as not all of the drugs found in the car were contained in the plastic bag, the prosecution quite clearly did not rely on custody and control of the bag by the accused. The Supreme Court following *Tong Peng Hong*'s case pointed out that as the vehicle was not 'anything' containing any dangerous drugs, the presumption under s 37(d) did not arise.

In *PP v Kang Ho Soh* [1991] 3 CLJ 2914, a big, red shopping bag was found in the boot of a car driven by the accused. The bag contained heroin. The car, however, did not belong to the accused. Though there is some reference to the application of s 37(d), it would appear from the judgment of the Court that the presumption was not relied upon to establish custody and control of the bag. The Court, held on the evidence that as the prosecution had not discharged 'the required standard of proof' the accused ought to be acquitted.

In another Supreme Court decision, *Abdullah Yaacob v PP* [1991] 2 MLJ 237, a package containing drugs was found in a car driven by the accused. He was charged and convicted. On appeal to the Supreme Court, Hashim Yeop Sani CJ, held, inter alia that as *from the evidence there was a probability of another person being also present in the car, the trial judge's failure to consider this evidence was a serious failure which had resulted in a miscarriage of justice to the appellant. The conviction and sentence was accordingly set aside.* From the report of the judgment, it is unclear whether the prosecution relied on s 37(d) in this case. There is no mention of it in the judgment of the Supreme Court (Emphasis by this court).

From an analysis of these decided cases, the following conclusions may be reached:

(a) If drugs are found in a vehicle, the prosecution cannot rely on s 37(d) by merely establishing that the accused had control or custody of the vehicle; *Tong Peng Hong*, *Syed Ali* and *PP v Lin Lian Chan*.

(b) No earlier reported decision has been drawn to the attention of this Court where the prosecution had succeeded in relying on the presumption by establishing that the accused had custody or control of a bag or any other container containing drugs found in a car or any other vehicle.

Though Thomson J in *Tong Peng Hong* drew a distinction between the lorry being considered the thing containing the drugs on the one hand, and the bag containing the drugs on the other, thereby suggesting that it is important for the prosecution to show that the accused had custody and control of the bag and not the vehicle, his Lordship in that case held that the presumption was not applicable to the bag. He observed:

> the thing which contains the opium was not the lorry but *the handbag to which, of course, by itself the statutory presumption had no application.*

Therefore, from the summary above, it appears to me on a fair interpretation of the section, that in certain circumstances a bag may fall within the scope of the

word 'anything' in s 37(d), even though it would lead to the anomalous situation where the presumption would not apply if the drugs were found just lying in the car without being contained in a bag. But it must emphasized that *for the presumption under s 37(d) to apply, the prosecution must first prove that the accused had exclusive custody or control of the bag. The presence of a bag in a vehicle, without any other evidence is insufficient establish conclusively that the bag was in the custody and/or control of the person present in the vehicle* (Emphasis by this court).

Therefore, it is now relevant to consider whether, in the present case, the accused had custody and/or control of the bag found, in the car? The prosecution has established that the car was registered in the name of the accused and that the accused was seen driving the car and alighting from it. These facts alone are insufficient to establish conclusively that the accused had control or custody of the bag. However, by the accused's own admission, which I accept, he said that he was aware of the bag in the car (see *Public Prosecutor v Chan Peng Fatt* [2000] 1 MLJ 179).

COMMON INTENTION

[66] As to the common intention, this court finds that:

(a) there is no evidence that both the accuseds came together to the place of crime either on the motorcycle, (exh P6) or otherwise;

(b) there is no evidence as to the relationship between the first and second accused;

(c) there is no evidence both the accuseds knew each other before they were both found near the motorcycle, the first accused being seated on the motorcycle and the second accused standing beside the motorcycle;

(cc) although both the accuseds were found at the scene, there was only one helmet found thereby indicating that there was only one person who came on the motorcycle and whose helmet it was had not been established.

(d) there is insufficient evidence to draw any inference if there was any prearranged plan or even a plan that was reached on the spot;

(e) there is no evidence for how long both the accuseds were chatting or talking to each other prior to the time when PW3 saw them at the scene;

(f) even if the evidence of PW3 is accepted as reliable that the first accused was seen meddling with something inside the carrier of the motorcycle where this court has found to be unreliable and not acceptable, it is still not safe and does not implicate the second accused who was standing beside the motorcycle to such an extent to find that the second accused had knowledge that the black bag or the items inside the black bag which was found by PW3 on a search conducted inside the carrier of the motorcycle had contained dangerous drugs;

(g) in cases of common intention, the prosecution must prove that one of the accused had committed the act as contained in the charge and that the other participated in it in furtherance of a common intention (see (*Public Prosecutor v Muhamad Nasir Bin Shaharuddin & Anor* [1994] 2 MLJ 576 at pp 588–589);

(h) the material contradictions in the evidence of PW3 has affected the main thrust of the prosecution case to such an extent that this court is unable to draw an inference that both the accuseds or the first accused were presumed to be in possession of the dangerous drug and to be read with s 34 of the Penal Code. There is insufficient evidence to draw an inference or to trigger the doctrine of common intention against the accuseds as required under the law (see *Mahbubh Shah* (1945) 27 LR 941 at p 943) (see also *R v Abbot* [1955] 2 All ER 899, *Public Prosecutor v Chan Ah Kow & Anor* [1988] 2 CLJ 821, *Shamsuddin Bin Hassan v Public Prosecutor* [1991] 3 CLJ 2414, *Berry v British Transport Commission* [1961] 3 All ER 65 at p 75).

[67] In *Lee Yoon Choy & 2 Ors v Public Prosecutor* (1949) 15 MLJ 66, Court of Appeal (Willan CJ, Spenser Wilkinson J and Russell J) said:

> (1) that the law of common intention in this country is defined in s 34 of the Penal Code and under the terms of that section, *there must exist a common intention to commit the crime actually committed and it is not sufficient that there should be merely a common intention to behave criminally*; (2) that there was no evidence in this case of any common intention to possess the arms or ammunition and therefore the conviction of the second and third appellants for possession of the arms and ammunition must be set aside (Emphasis by this court).

[68] In *Isa Bin Che Noh & Ors v Public Prosecutor* [1956] MLJ 93, His Lordship Rigby J said:

> for the prosecution to succeed in the case against the second and third appellants, *it was necessary to establish that there was a pre-arranged plan between all three appellants, not merely to assault the complainant but to assault him with a 'parang' or other cutting instrument. In my view the evidence in this case was insufficient to establish beyond reasonable doubt that there was in fact any such common intention between the three accused*… (Emphasis by this court).

[69] In *Dato' Mokhtar Bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 267, His Lordship Hashim Yeop A Sani J (as he then was) said:

> Under s 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention of an individual. In most cases, however, it can be inferred from his act or conduct or other relevant circumstances of the case (see *Mahbub Shah v King Emperor*). The doctrine of common intention is as expressed in s 34 of the Penal Code itself which reads:

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

It is also a common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of anyone of them to allege, and perhaps prove, that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Every one must be taken to have intended the probable and natural results of the combination of acts in which he joined.

Thus it is clear that the leading feature of s 34 of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfill the requirements of s 34. *First, there must be evidence (direct or by inference) the accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or prearranged plan involving the accused. This is logical because how can there be participation without physical presence? Even passive participation may require physical presence* (Emphasis by this court).

[70] In *Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 at p 344, His Lordship Syed Agil Barakbah SCJ said:

In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention (Emphasis by this court).

Direct intention of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, *common intention may be inferred from the facts and circumstances of the case and the conduct of the accused* (Emphasis by this court).

[71] In *Muhamad Safarudin Baba & Anor v PP* [2002] 4 CLJ 210 at p 222, His Lordship Mohd Noor Ahmad JCA (as he then was) said:

It is trite law that common intention within the meaning of s 34 of the Code implies a pre-arranged plan and to convict an accused person of an offence applying the section it must be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is difficult if not impossible to procure direct evidence to prove intention; likewise a prior concerted plan. In most cases it has to be inferred from the acts or conduct of the parties or other relevant circumstances of the case (see the Privy Council case of *Mahbub Shah v Emperor* AIR 1945 PC 116). *We are of the view that although the conduct of the first appellant on that occasion and his awareness that the first appellant was carrying the box might be relevant factors in order to*

consider the element of common intention but the knowledge presumed by s 37(d) of the Act upon the second appellant ought not to have been imputed to the first appellant because he did not have the custody or control of the box. Those two relevant factors by themselves were not sufficient to raise the inference of common intention, although they might raise the suspicion that the first appellant was involved with such drug. Suspicion, no matter how strong, is not evidence (Emphasis by this court).

(See *Santa Singh v Public Prosecutor* (1938) MLJ 58, *Chew Cheng Lye v Reg* [1956] MLJ 240, *Krishnan v Public Prosecutor* [1987] 1 MLJ 292 pp 295–296, *Namasiyiam & Ors v Public Prosecutor* [1987] 2 MLJ 336 at p 344, *Public Prosecutor v Lee Chee Meng & Anor* [1991] 1 MLJ 226 at p 228, *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632 at pp 637–638 and *Public Prosecutor v Muhamad Nasir Bin Shaharuddin & Anor* [1994] 2 MLJ 576). In the instant case, the prosecution has failed to show that there was a link between the first accused and the second accused with regards to the dangerous drugs which was recovered (see *Tansley v Painter* [1969] Crim LR 139 and *Public Prosecutor v Mohd Farid Bin Mohd Sukis & Anor* [2002] 3 MLJ 401).

[72] In *Bashir v State* AIR 1953 ALL 668 the Court of Appeal through Desai J said:

The presumption of the common intention must be subject to the same restrictions as other presumptions, it must not take the form of a bare surmise or conjecture or suspicion. There must be data from which it can be inferred and the inference of common intention 'should never be reached unless it is a necessary inference deducible from the circumstances of the case' [per Sir Madhavan Nair in 'AIR 1945 PC 118 at p 121(D)'] When the nature of the common intention is to be inferred, it must be inferred with the least amount of flight of fancy.

POWERS OF PROSECUTOR

[73] Be that as it may, as to the objection by the learned deputy public prosecutor to produce the police report lodged by PW3, this court is of the respectful view that the prosecutorial discretion *in the presentation of the case and choice of witnesses and evidence to be introduced* does not include withholding of relevant and material evidence in a criminal trial. If the evidence which is sought by the defence and introduced through cross-examination of a prosecution witness will assist the court to determine the truth of the version and arrive at a just decision then it is *inherently undesirable* for the prosecution to prevent it from being introduced on the ground that it is inadmissible and that the police report is not a first information report. There is no universal application that a police report is not admissible because it is not a first information report so long as it is relevant to show consistency or rebut or show inconsistencies with the evidence of a prosecution witness and to expose the infirmity of the prosecution case during the prosecution case itself and this is a matter for the court to decide on the set of facts in each case (see *Aziz Bin Muhamad Din v Public Prosecutor* [1996] 5 MLJ 473 and *Public Prosecutor*

v Dato' Seri Anwar Bin Ibrahim (No 3) [1999] 2 MLJ 1 at p 186). Interest of justice demands that this court should look at the police report lodged by PW3 to consider and determine whether he had departed with his evidence in court and if there was departure, whether it has materially affected the charge against the accuseds based on the credibility or reliability of PW3 on matters relevant to the charge. The issue of inadmissibility of the police report (exh D20) on the ground that it is not a first information report under s 107 of the Criminal Procedure Code and that it is an arrest report which was lodged after the investigation has commenced as contended by the learned deputy public prosecutor is entirely a separate matter and does not prevent the court from looking at it where it becomes necessary to ascertain the truth in respect of the charge which is framed and where the justice of the case so demands to direct a copy to be furnished to the defence so long as it is a relevant piece of evidence or it may cast a serious reflection on the fairness of the trial. It is duty of the court to see the justice is done according to law and both the prosecution and defence must have regard to the law.

[74] In *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 at p 438, His Lordship Edgar Joseph Jr FCJ said:

> We recognize that the function of the prosecution is to prosecute, and that does not mean that it must discharge the functions both of the prosecution and the defence.
>
> On the other hand, it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not (see *Teh Lee Tong v PP* [1956] MLJ 194). *That discretion, however, must be exercised having regard in the interests of justice, which includes being fair to the accused* (per Lord Parker CJ in *R v Oliva* [1965] 3 All ER 116 at p 122; [1965] 2 WLR 1028 at p 1035), and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v R* (1936) 3 All ER 36 at p 49, applied in *R v Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789) (Emphasis by this court). In that case, Edgar Joseph Jr FCJ referred to the statement of Lord Roche in *Seneviratne v R* (1936) 3 All ER 36 which states:
>
> > Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, *whether in the result the effect of their testimony is for or against the case for the prosecution* …. (Emphasis by this court).
>
> Went on to add:
>
> > to avoid any misapprehension we wish to make two observations about it [the statement by Lord Roche], First, it should be understood in the sense that it proffers advice to the prosecutor as to how he should approach his task and not as a rule of law formulating a duty owed by the prosecutor to the accused. Secondly, there is room for some debate as to what is meant by the opening words of the statement and it should not be read as inhibiting the discretion

A which the prosecutor has got to call in the Crown case any eyewitness if he judges that there is sufficient reason for not calling him, as, for example, where he can prove that the witness is not a credible and truthful witness. In this event the prosecutor will ensure that the accused is given the opportunity to call the witness.

B Having said that, it is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see eg *Adel Muhammed el Dabbah v AG of Palestine* [1944] AC 156 at pp 167–169; [1944] 2 All ER 139 at pp 143–144, the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and C if, in the exercise of its discretion, it fails to fulfill this obligation—which is nothing less than a statutory duty—the accused must be acquitted.

We were thus driven to the inevitable conclusion that the maintenance of the principle involved in this case was more important than the case itself. This is the principle enunciated in *Maxwell v DPP* (1934) 24 Cr App Rep 152 at p 176; (1934) All ER Rep 168 at p 75 D (Emphasis by this court).

… It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded or discredited.

E **[75]** It is important to observe that in any event, *rules of evidence* should not be used to obstruct justice or as *an engine of oppression* to such an extent that justice becomes subservient to those rules as a result of which the truth is blurred and testimony of witnesses *is infected with lies and fabrication of evidence*. Nobody, be it a defence counsel or a deputy public prosecutor both officers F of the court should attempt with respect to withhold relevant and material evidence from being admitted at a trial if that piece of evidence will disclose the true version or cast doubt on the credibility of a witness and is necessary or relevant for the attainment of justice. If this tactical act of withholding relevant and material piece of evidence is allowed to happen, it cannot be G anything but could arguably *tantamount to suppressing the truth* from being disclosed to the court and is arbitrary or unregulated exercise of power (see *Cheah Cheng Hoc v Public Prosecutor* [1986] 1 MLJ 299).

[76] This is a classic case in which it is essential to consider and weigh up the risk in terms of the likelihood of the potential injustice and the H consequences arising if both the accuseds were denied to have sight of the police report lodged by PW3 against them and the court must balance against the probable injustice that may be caused to the accuseds. Justice must be seen to be done according to law and the evidence and not at the whims of the prosecution so as to allow them to withhold relevant and material I evidence which if disclosed may expose a prosecution witness as a liar or that he has given a distorted version against the accused so as to implicate the accused to the alleged offence. In the instant case, the prosecution cannot

plead ignorance of the contents of the police report lodged by PW3 which is a complete departure and contains material contradictions and omissions and conflicts with his evidence in court *on the crucial issue of possession* and at the same time however seek to salvage the credibility of PW3 which was going down to the lowest level *by attempting to withhold* it on the ground that it is not a first information report which no doubt would have resulted in a miscarriage of justice if the police report was not brought to light. It is important to state at this stage that the circumstances as in the instant case triggers s 4 of the Criminal Procedure Code to be of assistance and has to be invoked by the court as the right of an accused to produce material evidence through cross-examination to cast doubt in the prosecution case and during the prosecution case itself is a substantive right and cannot be disregarded as a mere procedural matter. Section 4 of the Criminal Procedure Code states:

> Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court.

[77] In *Public Prosecutor v Saat Hassan & Ors* [1988] 2 CLJ (Rep) 290, His Lordship Shankar J (as he then was) said:

> In my view this section referring to s 4 expressly preserved the inherent jurisdiction of the High Court to make any order necessary to give effect to other provisions under the Code or to prevent abuse of the process of any Court or otherwise to secure the needs of justice.

(See *Hari Ram Seghal v Public Prosecutor* [1981] MLJ 165, *Tan Boon Hock v Public Prosecutor* [1979] 1 MLJ 236, *Karpal Singh v Public Prosecutor* [1991] 2 MLJ 544, *Husdi v Public Prosecutor* [1980] MLJ 80 and *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137).

[78] Be that as it may, this court wish to make it expressly clear that it is not the judicial function nor the concern of this court to know what is placed in the deputy public prosecutor's saddlebags. However, once the court is informed that the prosecution is attempting to withhold relevant and material evidence which if disclosed would show the true version as to what had occurred at the scene of the crime and exculpate the accused, then it becomes the function of the court to inquire into that piece of evidence to know if the witness had departed significantly from his police report without encroaching into the path of the prosecution (see *Husdi v Public Prosecutor* [1980] MLJ 80 FC), Nevertheless, in some cases, it must be observed that the defence counsel takes a great risk by the hunch that a prosecution witness may have deviated from his police report or his previous statement when compared to his evidence in court as it may work out as a '*double edged sword*' and damage the defence case or assist the prosecution to strengthen its case. However, this court will not allow any party who come before this court to have *disregard to the tragic consequences* which would follow if the truth is suppressed and disallowed to prevail where the innocent is convicted and the guilty is

acquitted. The learned deputy public prosecutor as an officer of the court, with respect must not abdicate his or her duty to share the responsibility with the view to ensure that the truth must always prevail and should not under any circumstances attempt to conceal from the court materials which may assist the trial court to determine the truth of a witness's testimony in court. If the accused cannot be allowed to seek justice in court *which is owed to him*, where else is he expected to obtain that purity of justice, 'a court in a criminal case would have, generally speaking to balance the interest of the prosecution on the one hand against those of the accused on the other' (see *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 CLJ 719 at p 725, *Kiew Foo Mui & Ors v Public Prosecutor* [1995] 3 MLJ 505 and *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 at p 441).

[79] This court is of the view that if a police report being a previous statement by a witness may be used to show consistencies with his evidence in court and may afford some ground of believing the witness then there is no reason why a police report of a witness notwithstanding that it may not be a first information report cannot be used to contradict the witness with his evidence in court and if necessary to show that there is some ground for disbelieving him when tested with the rest of the evidence (see *PP v Chow Kam Meng* [2001] 7 CLJ 387 at p 391) The mere fact that the police report is not a first information report does not necessarily render it inadmissible if it is found to be relevant to determine an issue before the court and it may become so relevant if it is indicative of a state of mind, such as control or the power to dispose of the incriminating article. The *defence cannot be denied the right to cast reasonable doubt* on the prosecution case during the prosecution case itself through cross-examination or by introducing relevant and material evidence to cast doubt on the testimony of the prosecution witnesses or to expose them as liars. (See *Wong Chooi v Public Prosecutor* [1967] 2 MLJ 180) (See *PP v Lin Lian Chen* [1992] 2 MLJ 561 HC; [1992] 2 MLJ 561 SC and *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 FC). This is elementary law in our judicial system and defence counsels should be allowed to carry out their duty as officers of the court without any intimidation in order to assist the court to reach a just decision by bringing to the notice of the court, in the instant case, the police report lodged by PW3 which is inconsistent and contains material contradictions and omissions when tested against his evidence and the rest of the evidence in court. (See *Public Prosecutor v Ramasamy* (1939) MLJ Rep 129 and *Osman Khan v Public Prosecutor* (1948) MLJ 56). In the instant case, there are no compelling reasons why it is reasonable to deny both the accuseds their right to show their innocence during the prosecution case itself even though there is no legal burden imposed on the accuseds to show any proof that they are innocent at this stage as both the accuseds are presumed to be innocent and do not have any duty to establish their innocence as it is still the duty of the prosecution to establish a *prima facie* case against the accuseds and this burden does not shift to both the accuseds

(see *Mohamad Radhi Bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 and *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137).

[80] In the instant case, this court is satisfied that the defence were not going on a fishing expedition or into the records of the prosecution or without any definite basis when it sought the police report lodged by PW3 to be introduced as a defence exhibit but with the true purpose to assist the court in arriving at a just decision and in accordance with the requirements of the established principles in criminal law. The truth should always be disclosed and that truth must prevail. In *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153 at p 162, His Lordship Raja Azlan Shah J (as His Highness then was) observed:

> *If an accused or his counsel has reason to believe that the evidence which the witness gives in the witness box differs in material particulars from the police statement he or his counsel can request the court to refer to a particular passage or passages in the statement and the court is obliged to refer to them. Failure to refer to such statement is a denial of justice (see Yohannan v R). The court then exercises its discretion whether to furnish the accused with a copy of the police statement. The true test when exercising such discretion seems to be that the police statement must afford material for serious challenge to the credibility or reliability of the witness on matters relevant to the prosecution case.* (See *Mohamed Fiaz Baksh v The Queen*). If the court finds there is no material to afford a serious challenge to the credibility or reliability of the witness, the accused need not be furnished with a copy of the police statement (Emphasis by this court).

[81] In *BA Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 146 at p 151 Raja Azlan Shah FCJ (as His Highness then was) said:

> In the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth. To obtain that the court should decide upon the relevant facts and at the same time that it should not hear some of those relevant facts from the person who best knows them and can prove them at first hand, seems to be a contradiction in terms. It is best that truth should be out and that truth should prevail.

[82] If a lawyer who is in possession of relevant and material documents which if disclosed to the court will determine the truth of the case withholds it from being introduced and as a result is subject to disciplinary proceedings, what is the position of a prosecuting officer, be it a deputy public prosecutor or a police officer in a criminal trial if a relevant or material piece of evidence or document to determine the truth of the case is not only not disclosed but withholds it especially where the accused is subject to death sentence if he is convicted. Since a deputy public prosecutor is also an officer of the court there is no reason why the same consequences should not apply or why it should be treated differently if and where that non-disclosure of material piece of evidence or document tantamount to withholding evidence which if disclosed would turn the scale in favour of the accused. This court wishes to

A expressly make it clear and reiterate that it is not the function or duty of the court to know what is in the saddlebag of the prosecution but once it has become obvious and glaring to a prosecuting officer or a police officer that the prosecution's witness is implicating the accused to the crime by departing on material facts from his previous statement to the police or the police B report which if disclosed will reveal the truth of the incident, then it becomes his or her duty to immediately bring to the attention of the court that the witness is contradicting or produce his previous statement or police report to the court in order to maintain substantial and the purity of justice (see *Dharmendrasinh v State of Gujerat* 2002 SCC (Cri) 859 and *Adel Muhammed el* C *Dabbah v AG for Palestine* (1944) AC 156).

[83] Principles enunciated or proposed by judges cannot remain standstill. There must be a continuous judicial development in order to reflect the changing perception of the society. It cannot be denied that facing a criminal trial and going through the traumatic experience of those who plead innocence D had to wait indefinitely until the completion of the trial and in some cases until the appeal is over to establish their innocence. It can also be devastating when evidence forthcoming from prosecution witness or witnesses contains contradictions, discrepancies, inconsistencies and is accompanied with bad faith. In those circumstances and in any event, it is settled law that the accuseds E should be granted indulgence to raise his defence during the prosecution case and at that stage itself to cast doubt on the prosecution case (see *Wong Chooi v Public Prosecutor* [1967] 2 MLJ 180 and *Public Prosecutor v Lin Lian Chen* [1991] 1 MLJ 316 HC and confirmed by the Supreme Court (*Public Prosecutor v Lin Lian Chen* [1992] 1 AMR 253 SC). In fact, this court will go one step further and state F that a presiding judge at the criminal trial has the discretion and right to call a witness not called by either the prosecution or defence and without the consent of either the prosecution or the defence if in his opinion this course is necessary and in the interests of justice so long as it is not done or calculated to do injustice to the accused and without allowing any extrinsic evidence (see *The* G *King v Dora Harris* (1927) 2 KB 587 at p 594 and *Balfour v Public Prosecutor* (1949) Supp MLJ 8 and s 425 of the Criminal Procedure Code, *R v Kooken* [1982] 74 Cr App Rep 30 and *R v Matthews & Matthews* [1984] 78 Cr App R 23).

[84] However, this court is mindful that the proof of the inconsistent statement in the police report lodged by PW3 does not constitute evidence of H fact but only to show evidence of inconsistency because of the contradictions of the evidence of PW3 with the contents of his police report. In other words, the former statement being the police report is not replacing the evidence of PW3 which has been contradicted in material particular and on the crucial issue of custody and control but only render his evidence completely I untrustworthy (see *Koay Chooi v Regina* [1955] MLJ 209, *R v Golder, R v Jones, R v Porritt* [1960] 3 All ER 457 and *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121 at p 124).

[85] This court found that this witness PW3 was put before the court as a perfectly honest witness and the fact that he has lodged a police report with entirely a different version on the issue of possession was never brought to the attention of this court and the learned deputy public prosecutor as an officer of the court owes a duty to the court to ensure that all relevant evidence are put before the court and leave it to the court to determine the truth or the credibility and reliability of a witness. In *Jaafar Bin Deris v Public Prosecutor* [1956] MLJ 183, His Lordship Rigby J said:

> It would *seem abundantly clear from the record that this witness was put before the Court as a perfectly honest witness*, and the fact that he was in fact clearly an accomplice in disposing of the bicycle and that he had been convicted and sentenced as such, *was never brought to the notice of the trial Court. It is deplorable that this should be so.* Quite clearly, it was the duty of the prosecution, when calling this witness before the Court, to elicit from this witness at once that he had been an accomplice in disposing of the property, and that he had been convicted and sentenced as such. If this had been done, then the Court, although considering him as an accomplice, would have been in a position to decide as to the credibility of his evidence… *I repeat, quite clearly this should have been done by the prosecution* (Emphasis by this court).

[86] On the other hand, it would be so satisfying to note if and whenever the prosecuting officer, be it a deputy public prosecutor or a police officer magnanimously concedes that the evidence introduced by the prosecution through their witnesses has become so unreliable and unsatisfactory to such an extent that the court should not place importance or reliance to implicate the accused. In *Teo Peen Soon & Ors v Reg* [1956] MLJ 241, His Lordship Whyatt CJ at p 242 observed:

> *Counsel for the Crown in arguing this appeal very fairly conceded that evidence of identification obtained in this manner is worthless and indeed he informed the Court that the Crown did not rely on it. We were glad to hear Counsel for the Crown making this admission to the Court* but we feel bound to point out that it is most unfortunate in these circumstances that this evidence was ever placed before the jury at all; particularly as the appellant was unrepresented (Emphasis by this court).

[87] In *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257 at p 258, His Lordship HT Ong FCJ (as he then was) observed where His Lordship said:

> *The learned deputy public prosecutor conceded, rightly and properly in our view … he again conceded* that it was highly improbable that the iron rod could have been used in the manner demonstrated both by the prosecution witnesses. (Emphasis by this court)

[88] Be that as it may, it is not inappropriate to state at this stage that this court regrets that the observation of His Lordship Thomson CJ (as he then was) in *Public Prosecutor v Mohamed Ali* [1962] MLJ 257 at p 258 on police witnesses has to be presently reviewed and cannot apply on the facts in the instant trial especially to D/Cpl Shaffiai (PW3) as his evidence in court has been contradicted in material particular on the essential ingredient of the

offence, being possession and his veracity is doubtful. His Lordship Thomson CJ (as he then was) observed:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon, his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur, there is not the slightest justification for refusing to believe him.

PRIMA FACIE

[89] This court found that there is doubt in the whole of the prosecution case and it would be safer to grant the accuseds the benefit of doubt (see *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137). In *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 at p 17, His Lordship Sharma J said:

> A conviction cannot be sustained even if the court is satisfied that the prosecution story 'may be true' unless and until it is found that the prosecution story 'must be true'. The burden of proof remains on the prosecution throughout the trial. If the learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. The burden of proving guilt in a criminal charge is always on the prosecution except in certain cases with which we are not concerned here.

[90] In *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116, His Lordship HT Ong CJ said:

> the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else.

[91] In *Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423 at p 425, Mohamed Yusoff SCJ said:

> Be that as it may, we feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference alone is not sufficient to support a conviction of the appellant without some proof of the element of control.
>
> In the present case we are of the view that although it is unfortunate that a guilty party cannot be brought to justice, it is more important that there should not be a miscarriage of justice and the law should be maintained that the prosecution should prove its case.

[92] In *Pavone v Public Prosecutor (No 2)* [1986] 1 MLJ 423 at p 426, His Lordship VC George J (as he then was) said:

> In the instant case although the accused appeared to have been caught red-handed there has been more than one material gap in the prosecution case. The appeal has to be allowed.

[93] In *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 at p 441, His Lordship Edgar Joseph Jr FCJ said:

> We were thus driven to the inevitable conclusion that the maintenance of the principle involved in this case was more important than the case itself. This is the principle enunciated in *Maxwell v DPP* (1934) 24 Cr App Rep 152 at p 176; (1934) All ER Rep 168 at p 175:
>
> > It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded or discredited.

[94] On the totality of the evidence of the prosecution's case, this court finds that the prosecution has failed to establish a *prima facie* case and it is not safe to call both the accuseds to answer the charge on mere conjecture based on speculation and on unreliable evidence. This court finds that the defence has succeeded in casting doubt on the prosecution's case during the case of the prosecution itself. Accordingly, both the accuseds are acquitted and discharged without calling for their defence.

Accuseds acquitted.

Reported by Izzaty Izzuddin